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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1838

GILES CRISLER, COMMISSIONER OF PUBLIC SAFETY OF THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

vs.

WILLIE MORROW AND JEROME MANGUM, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

GILES CRISLER, COMMISSIONER OF PUBLIC SAFETY OF THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

vs.

WILLIE MORROW AND JEROME MANGUM, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 27, 1974.

OPINIONS BELOW

The decision of the panel of the United States Court of Appeals for the Fifth Circuit is reported at 479 F.2d 960 (1973). It appears in the Appendix hereto as Appendix "A". The as yet unreported decision of the en banc court, Fifth Circuit, 1974, ... F.2d ..... [No. 72-1136, March 27, 1974], is included as Appendix "B". The opinion of the United States District Court for the Southern District of

Mississippi, reported at 4 [CCH] EPD §7563, is included as Appendix "C". The District Court's orders on relief appear at 4 [CCH] EPD §§7541, 7584 and 5 [CCH] EPD §8590 and are included here as Appendices "D", "E", and "F", respectively. The Order of the Court of Appeals granting the motion of Plaintiffs-Appellants to supplement the record on appeal is included as Appendix "G".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting en banc, was entered on March 27, 1974. This Petition For Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal court has authority to require a State to formulate and implement an employee hiring and appointment policy which accords a preference solely on the basis of race.

2. Whether under the Eleventh Amendment the affirmative relief directed against the State through its officers was proper.

3. Whether a federal court through operation of judicial oversight of discretionary appointments may interfere with the ability of the State of Mississippi to exercise its police power.

4. Whether the District Court had authority to grant class relief after finding that the named Plaintiffs were not discriminated against.

5. Whether the Court was justified in fashioning an order prospectively, where the foundation of its holding was evidence of practices of former officials and there was no evidence of discrimination by the present officials.

6. Whether the Court of Appeals has authority to require on remand that the District Court grant further and additional relief based upon evidence presented directly to the Court of Appeals, such evidence never having been presented to the District Court.

7. Whether under the Eleventh Amendment the award of attorneys' fees was proper.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

The Fifth, Eleventh and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioners are the Governor of the State of Mississippi, the Commissioner of Public Safety, the Chief of the Highway Patrol and the Personnel Officer, each person now occupying said positions having been substituted as parties Defendant and neither of them having had their day in Court.

Two named Plaintiffs, Willie L. Morrow and Jerome Mangum, brought this civil rights suit to enjoin racial discrimination in employment and working conditions in the Mississippi Highway Safety Patrol. The District Court entered a declaratory and injunctive decree in favor of Plaintiffs notwithstanding a finding of their failure to prove

any discrimination on the part of the then serving Patrol officials. The Plaintiffs appealed on the ground that they were not afforded sufficient relief and Defendants cross-appealed. The Court of Appeals affirmed, 479 F.2d 960. On rehearing en banc, the majority held that the evidence before them, by way of a supplement to the record which the District Court had not seen, established that declaratory and injunctive relief granted the Plaintiffs would not remedy racial discrimination existing in history although not practiced by the named Defendants. The en banc Court affirmed but remanded the suit to the District Court to fashion a decree within their adumbrated guidelines. Beyond insuring that objective hiring criteria are utilized, the en banc Court mandated the District Court to order affirmative hiring relief and suggested quotas, the creation of hiring pools, or a freeze on white hiring. The Court also suggested that qualifications might need to be lowered.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals adumbrated preferential treatment of minority applicants over white applicants, solely on the basis of race, violates the Fourteenth Amendment's Equal Protection Clause. It is reverse discrimination as alluded to by Mr. Justice Frankfurter in *Hughes* v. *Superior Court of California,* 339 U.S. 460, 464, 94 L.Ed. 985, 991 (1950) when he used the language of the California Court interlaced with his own to say that the Constitution does not allow such:

> " 'It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, supra (25 Cal.2d 721, 737, 745). The fact that those seeking such discrimination do not demand that it be practiced as to all employees of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object.' 32 Cal.2d at 856, 198 P.2d at 889.

These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations."

The concurring opinions and the dissents each recognize the existence of constitutional infirmities in the race-conscious hiring relief mandated by the controlling opinion. But while the Supreme Court as late as *Defunis* v. *Odegaard*, ... U.S. ....., 42 L.W. 4578 [April 23-74], continued to address itself to racially neutral policies, the Court of Appeals breaks judicial new ground with affirmative hiring practices based solely upon race.

If the solution of racial problems is to be promoted by depriving citizens of constitutional rights and privileges

(reverse discrimination), will litigating the race of an individual not become a necessary process in the expansion of such logic? Mr. Justice Douglas points to the fact that the Supreme Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U.S. 214 (1944), and *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), in his dissent in *Defunis*, supra. He sees "the key to the problem is consideration of such applications in a racially neutral way." This is contrary to the holding of the Court of Appeals here. Mr. Justice Douglas says: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." (*Ibid.* 4586).

The cause sub judice is fraught with constitutional infirmity. Mr. Justice Douglas says: "There is no constitutional right for any race to be preferred." (*Ibid.* 4585). Petitioners must use racial preference in hiring in the present posture. "All races can compete fairly at all professional levels. So far as race is concerned any state sponsored preference to one race over another in that competition is in my view 'invidious' and violative of the Equal Protection Clause." (*Ibid.* 4587).

Petitioners join with Mr. Justice Brennan in stating: "Few constitutional questions in recent history have stirred as much debate, and they will not disappear." (*Ibid.* 4589).

This constitutional question begs for resolution. If preference is to be disallowed then it needs to be unequivocally stated. If racial classification is to be sanctioned then boundaries need to be drawn. The cause sub judice offers a vehicle for the Supreme Court to speak directly to a disquieting and troublesome area of law which presently is fostering litigation from a lack of clarification.

II.

The affirmative relief directed against the State through its officers is not proper under the Eleventh Amendment. Although the State is not a party in name the opening sentence of the en banc opinion belies any argument to the contrary—"This case involves racial discrimination in the employment practices of the Mississippi Highway Patrol." As stated by the Court in *Hagood* v. *Southern*, 117 U.S. 52, 69 (1886):

> "If the State is named as a defendant it can only be reached either by mesne or final process through its officers and agents; and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself."

See *Cunningham* v. *Macon, Etc., R.R. Co.*, 109 U.S. 446 (1883); *Ex Parte Agers*, 123 U.S. 443 (1887); *State of North Carolina* v. *Temple*, 134 U.S. 22 (1890); *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Simons* v. *Vinson*, 5 Cir. 1968, 394 F.2d 732; *Gardner* v. *Harris*, 5 Cir. 1968, 391 F.2d 885; *Colson* v. *Hickel*, 5 Cir. 1970, 428 F.2d 1046; *Blaze* v. *Moon*, 5 Cir. 1971, 440 F.2d 1348; *Gnotta* v. *United States*, 8 Cir. 1969, 415 F.2d 1271, Cert. Denied, 397 U.S. 394 (1970).

In approaching the question of immunity, the Court must bear in mind at all times the distinction between prohibitory relief and mandatory relief. We admit that case law supports the proposition that a State official can be enjoined to cease and desist from performing an unconstitutional act, *Sterling* v. *Constantin*, 287 U.S. 378, 77 L.Ed. 375, 53 S.Ct. 190, but he cannot be required to perform an affirmative act. The theory that a State official can be enjoined from performing an unconstitutional act is based on "state action" in contrast to "an act of the State." When a State official acts contrary to the Constitution of the United States, in theory he is no longer acting as the State because "the State can do no wrong." Therefore, suits brought to enjoin a State official who is acting unconstitutionally is not brought against the State, but is brought against the individual so acting. But when an action is brought to force a State official to perform an affirmative act in his official capacity, then the action is brought against the State and is barred by the Eleventh Amendment to the Constitution of the United States or the common law as pronounced in *Hans* v. *Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504.

In the Complaint in this case, the Plaintiffs ask to be hired as employees of the State; a money judgment for loss of prospective income; a *mandatory* injunction requiring Defendants to institute affirmative action including the recruiting of Negro officers; and an injunction against alleged discriminatory employment practices. The thrust of the relief sought is directed at the State of Mississippi and could be granted only by requiring the nominal Defendants as officers of the State to take *affirmative* action to provide such relief. Thus it is clear that the State is the real party in interest and the common law as announced in *Hans* v. *Louisiana*, supra, denies jurisdiction to entertain

this action. The law relative to the State's immunity in such a case was clearly stated in *Hagood* v. *Southern*, 117 U.S. 52 at 67, 6 S.Ct. 608 at 615, 29 L.Ed. 805:

> "Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is therefore substantially within the prohibition of the eleventh amendment to the constitution of the United States, ...
>
> "The case comes thus directly within the authority of Louisiana [ex rel. Elliott] v. Jumel, 107 U.S. 711, 2 S.Ct. 128."

In *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, Justice Douglas stated:

> "[T]here are, of course, some questions beyond judicial competence. Where the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other (Kentucky v. Dennison (U S) 24 How 66, 109, 16 L.Ed. 717, 729), for to do so would be to take over the office."

The Supreme Court of the United States in *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 35 L.Ed. 363, surveys the two classes of cases and establishes the criteria for deciding

whether an action is one against the State or one against the individual, though acting in his official capacity, is acting in an unconstitutional manner. The rationale of the decisions surveyed by the Court is that if the judgment is to operate directly against the State and therefore require the State to act, then the suit is against the State and therefore barred by the Eleventh Amendment to the Constitution of the United States or the common law as enunciated in *Hans* v. *Louisiana,* supra. This is the rationale of *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 93 L.Ed. 1628.

Once the determination has been made that this is in fact a suit against the State of Mississippi which seems to be an inescapable conclusion, Plaintiffs are confronted by the insuperable barrier of lack of jurisdiction in the District Court since it is now well settled that a state is immune from suit in a Federal Court by its own citizens. *Hans* v. *Louisiana,* supra.

III.

The Court of Appeals through operation of judicial oversight of discretionary appointments is restricting the ability of the State of Mississippi to exercise its police power. By legislative enactment the State created an agency, the Mississippi Highway Patrol, and also established minimal intelligence, educational and physical qualifications for those who would staff that agency. These state officials are charged with the execution of duties vital to the enforcement of the law and the preservation of human life on the highways within the State. In *Carter* v. *Jury Commission of Green County,* 396 U.S. 320 (1970) the Court said the State had the right to prescribe the qualifications of those State officials who are charged with the performance of purely State functions. This was most

recently stated as a concern of this Court in *Mayor of the City of Philadelphia, et al.* v. *Educational Equality League, et al.*, ... U.S. ....., 39 L.Ed.2d 630 (1974). Here, too, the delicate issues of federal-state relationships are nagging the Court for definitive resolution.

While staying their own hand by a noteworthy reminder of their limited role in fashioning equitable decrees, the Court nonetheless saw fit to adumbrate guidelines for the District Court. This adumbration serves equally to foreshadow the Petitioners' present plea for further judicial review and to destroy or minimally to consume the District Court's discretion in fashioning equitable relief. It seems to be forgotten or, if not, lost in the quagmire of rhetorical argument that the District Court found that the Plaintiffs had failed to prove any discrimination in the employment practices and further that the two Plaintiffs could have applied except for their own election not to do so. This fact when matched with the Court's statistics developed in the dissent of Judge Coleman should serve to bring all back to the realization that Petitioners are faced with a real problem of finding competent and qualified manpower. Race begs the question.

The era is one which finds government spending millions to up-grade and professionalize law enforcement. The Law Enforcement Assistance Administration is but a single example of the response of government to its constituency. More intelligent and better educated officers are the hue and cry of those who promote standards. The American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Urban Police Function*, tentative draft, March 1972 is an example of which there are many. From this stampeding toward betterment the Court of Appeals strikes at the foundation of the competency of the Mississippi Highway Patrol—a simple and

surely objective requirement that an applicant have a high school education or its equivalent. The realization can hardly be made more vivid than it has been in the dissenting opinion:

"It is too late to weep when some under-educated, subnormally intelligent individual, white or black, armed with deadly weapons, unjustifiably launches a human being into eternity or severely wounds him or impermissibly deprives him of his liberty simply because that officer was thrust into a position for which he lacked the education, the intelligence, and the sound judgment to deal with problems which highway patrolmen have to encounter every day."

When such a penetrating thought is coupled with the dockets of the courts where daily there are found accountings, civil and criminal, laid at the feet of public officials for a failure to train or the hiring of incompetents the forced reduction of standards seems paradoxical.

Judge Cardozo's prophetic phrase is heightened as the hiring of blunder-prone constables is mandated in the form of dilution of employment qualifications—"The criminal is to go free because the constable blundered." *People* v. *Defore*, 242 N.Y. 13 (1926).

IV.

The District Court did not have the authority to grant class relief after finding that the named Plaintiffs were not discriminated against. The discrepancies between the findings of fact and conclusions of law are readily apparent. The Court found as fact that the Plaintiffs were not denied applications because of their race. The Court also found that the Plaintiffs were invited to return for applications and they chose not to do so. Finally, the Court found a

thorough and valid nondiscriminatory explanation existed for the treatment accorded the named Plaintiffs.

The conclusions of law, deduced from the findings of fact are inconsistent. They correctly recite that statistics create a prima facie case sufficient to shift the burden, but the further conclusion that the burden was not lifted merely by denials of discrimination or unwritten rules ignores the total thrust of the evidence. The Court found that the Defendants had not discriminated, based upon race or otherwise, in dealing with these Plaintiffs. The prima facie case was met and overcome—witness the nondiscriminatory treatment of the Plaintiffs.

On January 15, 1974, the Supreme Court spoke to this issue in reversing the judgment of the Court of Appeals in *O'Shea* v. *Littleton,* ..... U.S. ....., 38 L.Ed.2d 674, 682:

> "Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33, 7 L.Ed.2d 512, 82 S.Ct. 549 (1962); Indiana Employment Division v. Burney, 409 U.S. 540, 35 L.Ed.2d 62, 93 S.Ct. 883 (1973). See 3B Moore's Federal Practice, §23.10-1, n.8 (2d ed. 1971)."

V.

The Court of Appeals was not justified in fashioning prospective relief where the foundation of its holding was evidence of practices of former officials and there was no evidence of discrimination by the present officials or their immediate predecessors.

In *Spomer* v. *Littleton, et al.*, ... U.S. ....., 38 L.Ed.2d 694, the following quotation may be found, which by

changing names would mirror the circumstances before the Court in the case sub judice:

> "It has become apparent, however, that there is nothing in the record upon which we may firmly base a conclusion that a concrete controversy between W. C. Spomer and the respondents is presented to this Court for resolution. No allegations in the complaint cited any conduct of W. C. Spomer as the basis for equitable or any other relief. Indeed, Spomer is not named as a defendant in the complaint at all, and of course, he never appeared before either the District Court or the Court of Appeals. The injunctive relief requested against former State's Attorney Berbling, moreover, is based upon an alleged practice of willful and malicious racial discrimination evidenced by enumerated instances in which Berbling favored white persons and disfavored Negroes. The wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney. No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that Berbling, as the incumbent at the time, was then continuing the practices he had previously followed. Cf. Allen v. Regents of the University System of Georgia, 304 U.S. 439, 444-445, 82 L.Ed. 1448, 58 S.Ct. 980 (1938)."

The District Court by Memorandum and Order dated May 25, 1972, made an automatic substitution of the following Defendants: William Waller, Governor of Mississippi; W. O. Dillard, Commissioner of Public Safety; Wood Stringer, Jr., Chief of Patrol. The remaining Defendant Charles E. Snodgrass, Personnel Officer, has since been replaced by two successive personnel officers with

the post presently held by J. Y. Thomas. Snodgrass has never been substituted although the District Court's pre-*Spomer* application of Rule 25(d), F.R.C.P., to the other Defendants would have made such a mere technical nicety. However with the current teachings of *Spomer* and their reiteration and definiteness expressed in *Mayor of the City of Philadelphia, et al*, v. *Educational Equality League, et al.*, (1974) ..... U.S. ....., 39 L.Ed.2d 630, this action of the District Court, subsequently affirmed by the Court of Appeals, is seen as absolute error which begs for correction. This Court there said "where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, *at a minimum*, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor." (emphasis added)

Here the now substituted Defendants were faced with operating their respective offices under Court direction from the moment they took their oaths. It therefore seems inconceivable that they could be charged with the continuation of the practices of their predecessors except within the strictly limited parameters fashioned by the District Court which under penalty of law they were bound to do. Moreover, it should be noted that the District Court determined in its opinion filed September 29, 1971, that the Plaintiffs had failed to prove any discrimination in employment practices on the part of the then serving patrol officials. The relief granted the Plaintiff class was founded upon a presumption of racially discriminatory employment practices created by statistical disparities. The District Court stated the underlying goal of the relief granted to be the erasure of these statistical disparities. The Court of Appeals took those same statistical disparities

and going outside the record which was developed in the District Court, concluded that "the relief ordered by the District Court is insufficient." (2071)

Exactly as the sequence of events in *Mayor of the City of Philadelphia, et al.* v. *Educational Equality League, et al.*, supra, the officeholders changed while the case was sub judice and although there was nothing in the record addressed to the appointment practices of the new officeholders the Court of Appeals directed the issuance of extensive injunctive relief against them.

VI.

The Court of Appeals did not have the requisite authority to require on remand that the District Court grant further and additional relief based upon evidence presented directly to the Court of Appeals, such evidence never having been presented to the District Court.

On April 18, 1973, a panel of the Court of Appeals issued its decision to affirm the District Court with an admonition to the Plaintiffs that "The [District] Court has retained jurisdiction to make the decree work." The Plaintiffs petitioned for a rehearing en banc and on May 7, 1973, moved to supplement the record on appeal. Their motion to supplement was renewed on October 23, 1973, and granted by order of Judge Brown filed November 8, 1973. The supplement in the form of statistics was the basis for the en banc opinion.

This Court has previously held under a strikingly similar set of circumstances that an appellate court does not have the authority to make determinations based upon facts submitted to it which were not first submitted to the trial court for its determination. In *Northcross* v. *Board of Education of Memphis*, 397 U.S. 232, 25 L.Ed.2d

246 (1970) the District Court, based upon the statistical data then before the Court, made a finding that the Board of Education of Memphis was operating a dual school system. The Court then directed the board to file a desegregation plan prior to January 1, 1970, including but not limited to projected enrollment figures by race as to revised school zones. Immediately thereafter and prior to the submission of the new plan and required statistical data the case was appealed to the Court of Appeals for the Sixth Circuit. On January 12, 1970, after the new plan had been submitted accompanied by the required statistical data to the District Court the Plaintiffs sought from the Court of Appeals an injunction requiring the school board to formulate a desegregation plan different from and in addition to that already filed as ordered by the District Court. The Court of Appeals reviewed the new plan and statistical data submitted in the District Court and presented to the Court of Appeals by the Plaintiffs. Based upon their review of the new plan and statistical data which had never been passed upon by the District Court, the Court of Appeals determined and found that the school board was then operating a unitary school system. On petition for certiorari this Court held that the revised plan and statistical data upon which the Court of Appeals made its finding was not properly before the Court and therefore it was premature for the Court of Appeals to consider the revised plan and the accompanying statistical data. The Court directed that the Court of Appeals remand the action to the District Court for proceedings upon the revised plan and statistical data.

Under the teachings of *Northcross* we suggest to the Court that the Court of Appeals should have at most remanded the case sub judice to the District Court for reconsideration in light of the statistical data presented in the first instance to the Court of Appeals.

VII.

The award of attorneys' fees which requires the payment of funds from the State Treasury is not proper under the Eleventh Amendment. The Court of Appeals, notwithstanding its recognition of the State as the real party in interest, instructed the District Court to reconsider the award of the amount of attorney's fees and to "award such fees as may be appropriate for this appeal and further proceedings." This instruction was given over the objection of the Petitioners. While their protestations were not necessarily articulated as hereinafter set forth they were nonetheless made in both the District Court and the Circuit Court. In essence that which Petitioners perceive as error was most recently stated by this Court in *Schever* v. *Rhodes, et al.* and *Krause* v. *Rhodes, et al.*, ... U.S. ....., 42 L.W. 4543 [April 17, 1974], ". . . it is clear that the doctrine of *Ex Parte Young* is of no aid to a plaintiff seeking damages from the public treasury, Edelman v. Jordan, ... U.S. .....; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Company v. Dept. of Treasury, 323 U.S. 459 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1945), . . ."

At the close of the controlling opinion in *Edelman* v. *Jordan*, ... U.S. ....., 39 L.Ed.2d 662, 680-681 (1974), the following language may be found: ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young*, supra, and may not include a retroactive award which requires the payment of funds from the State treasury, *Ford Motor Co.* v. *Department of Treasury*, supra." After stating the Eleventh Amendment proscription to be a jurisdictional bar the Court then said, "For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not

constitute a bar to that portion of the District Court decree which ordered retroactive payments of benefits found to have been wrongfully withheld." Compounding the similar error here is the fact that the benefits or attorney's fees were not "wrongfully withheld" but rather should never have been awarded.

The Court of Appeals here did not have the March 25th teachings before them when they made their March 27th erroneous award of attorney's fees. For this not insubstantial error standing alone certiorari should be granted to allow correction to be made.

CONCLUSION

The writ should issue to allow this Court to still the disquieting rumblings across the length and breadth of the nation regarding preferential treatment to be accorded one race over another. The Court's repeated suggestions of racially neutral policies remain unheeded. The problem must be dealt with directly.

In *Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1214 n.69 the District Judge stated: "Courts are in substantial disagreement as to the propriety, or legality, of racial employment quotas as remedies for discrimination in public employment." The Court of Appeals for the Fourth Circuit affirmed and specifically agreed with the District Court's discussion of racial quotas, as appropriate relief, *Harper* v. *Kloster*, 486 F.2d 1134, 1136 (1973). The need for direction from this Court is highlighted by the statement of Judge Clark writing for the Court of Appeals in *NAACP* v. *Allen*, No. 72-1796, April 19, 1974: "Until the Supreme Court issues a definitive ruling on this question [constitutionality of racial quota

relief], *Morrow* and the overwhelming weight of judicial authority have conclusively established that appellate review of quota hiring is limited to whether the imposition of such relief in a given situation constitutes an abuse of the federal chancellor's discretion."

The Supreme Court's Rule 19(1)(b) enumerates reasons which will be considered as grounds for review on writ of certiorari. Each reason is touched by the issues encompassed in the cause sub judice. Surely the consequences with which law enforcement officials will be met under the present holdings of this case, of a certainty within the jurisdiction of this Court of Appeals and persuasively across the nation, are deserving of this Court's deliberations and definitive resolution.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1136

WILLIE L. MORROW and JEROME MANGUM, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants-
Cross Appellees,

versus

GILES W. CRISLER, Commissioner of Public Safety of Mississippi, ET AL.,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

(April 18, 1973)

Before BELL, GOLDBERG and RONEY, Circuit Judges.

RONEY, Circuit Judge: This is a civil rights suit involving racial discrimination in employment and working conditions in the Mississippi Highway Safety Patrol. The District Court entered a declaratory and

injunctive decree in favor of the plaintiffs who appeal on the ground that they were not accorded sufficient relief by the Court. The defendants cross-appeal. We affirm.

The defendants' cross-appeal is without merit. The population of the State of Mississippi was 36.7% black according to the 1970 Census. The Mississippi Highway Patrol has never in its history employed a member of the Negro race as a sworn officer. As of April 15, 1971, of the 27 bureaus within the Department of Public Safety, only two, the Maintenance Bureau and the Training Academy, had any black employees and these consisted of cooks and janitors. The employees of all other bureaus within the Department, including clerical and secretarial personnel and sworn officers, were white. Of the Department's 743 employees, only 17 are black. Since January 1, 1968, 197 persons, all white, have been hired as Mississippi Highway Patrolmen. The evidence presented in this case amply supports the District Court's conclusion that the policies and practices of the defendants constitute a pattern and practice of racial discrimination in hiring and employment in violation of the Fourteenth Amendment to the United States Constitution and that plaintiffs are entitled to injunctive relief.

This brings us to the plaintiffs' appeal. The District Court entered a declaratory and injunctive decree, attached in full as an appendix, which declared the right of the plaintiffs and the members of the plaintiff class to be treated equally without racial discrimination, and enjoined the defendants from (1) racial discrimination in the distribution, receipt, and processing of all appli-

cations for employment within the Department of Public Safety; (2) from continuing, maintaining or instituting any of any of nine specified racially discriminatory practices, including the requirement of passing a standardized general intelligence test or the Otis Quick Mental Scoring Test or any other tests which have not been validated nor proved to be significantly related to successful job performance; (3) from applying for the next five years any standards or conditions of employment more stringent than those previously applied that would make it more difficult for future employees to be hired; (4) from giving preference to applicants who have relatives in the Department; (5) from using recruiting films which imply that responsible positions are open to or held by whites only; and requiring defendants to (6) conduct an affirmative recruting program oriented to the black population; (7) comply with Departmental Rules and Regulations prohibiting the use of any racial terms and epithets which are humiliating, derogatory, and insulting to anyone because of their race, color, creed, or national origin; (8) maintain records and make reports as to the race of all applicants, employees, hirings, promotions, demotions, and discharges for a three to five year period.

The Court specifically denied the individual plaintiffs the relief of hiring, training, and back pay, and denied the affirmative relief of requiring the defendants to increase the number of black officers by minority preference on a racial quota system, to the end that the percentage of blacks on the Patrol does not significantly differ from the percentage of blacks in the population of the State of Mississippi.

The question before us is whether the District Court was required to afford the affirmative relief as a matter of law.

Relief as to Individuals

The decision as to whether the individual plaintiffs were legally entitled to affirmative relief turns on whether or not the Court was clearly erroneous in finding that at the time that plaintiffs sought application forms in June, 1970, they were denied the requested forms because of an employment freeze or embargo caused by budgetary problems and were not denied these forms because of their race. The plaintiffs argue that once it was determined defendants were guilty of a pattern and practice of racial discrimination in hiring and employment practices, the defendants must show by clear and convincing evidence that the action was taken for other than racial reasons. The plaintiffs argue that the findings of the Court are not insulated from a full review by the clearly erroneous standard because the Court applied the wrong legal standard. This argument is not without some difficulty. We think, however, that the plaintiffs misconceive the force of their figures. Once the state proved that there was an embargo on hiring at the time the plaintiffs sought to apply, *i.e.*, that no one was hired, black or white, because of budgetary reasons, then the prima facie case of discrimination fades for that period of time. The essence of the case is whether the plaintiffs did not get jobs because of their race. The court having determined that no one got jobs during the period involved simply means that the plaintiffs would not have gotten the jobs had they been white. This being the

case, they cannot now obtain employment, back pay, and other benefits as if they would have received jobs, but for their race. The evidence concerning the embargo was conflicting, but once the credibility choices were resolved by the District Court, we cannot hold that the Court's decision was clearly erroneous. The plaintiffs were told to return for applications in September, 1970, at which time the embargo would be lifted. They did not do this, even though advised by an attorney to do so. The evidence is not sufficient to conclude that they would now be working for the Department had they been white, which would seem to be a *sine qua non* for the relief they request.

The Class Relief

The question here is whether the District Court granted sufficient equitable relief to eliminate the discriminatory effects of the past as well as to bar like discrimination in the future. If it did not, it abused its discretion, and the case would be remanded for the entry of appropriate relief.

The appellants argue that the relief granted was insufficient for two reasons: *first*, the Court should have ordered affirmative hiring relief for minority persons as a class, through either minority preference in hiring or quota hiring, and *second*, the Court should have enjoined the administration of unvalidated employment tests.

We do not reach the question as to whether it would have been within the Court's discretion to order relief of this kind. We merely decide that, under the facts

and circumstances as shown by the record in this case, the failure to fashion relief along these lines was not an abuse of discretion.

The approach to the review of orders of District Courts in granting relief in cases involving racial discrimination in public hiring is not unlike that referred to by the Supreme Court in *Swann v. Board of Education*, 402 U.S. 1, 15 (1970):

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. *Hecht Co. v. Bowles*, 321 U.S. 321 329-330 (1944), cited in *Brown II* [*Brown v. Board of Education*, 349 U.S. 294, 300 (1955)]'. . . .
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of

> a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."

402 U.S. at 15-16. *See Smith v. Young Men's Christian Ass'n of Montgomery*, 462 F.2d 634, 649 (5th Cir. 1972).

We are met with this obstacle to the argument that the Court did not require enough: there is no showing in this record that the relief it granted will not remedy the wrong. There is no evidence in the record from which to infer the percentage of the hired employees of the Highway Patrol that be white and the percentage that would be black, but for racial discrimination. There is no evidence that the enforced recruiting measures ordered by the District Court will not be sufficient to assure all interested members of the minority class that they will be hired by the Department, if qualified. There is no evidence that the present qualifications need be changed in order to open the doors to black applicants.

The State argues *first*, that quota-based relief would exceed the needs made out by the statistics in this case and would constitute an unconstitutional preference, and *second*, that the finding that the Otis Test was unvalidated is incorrect, arguing that the test has been ruled by this Circuit to be validated as a matter of law.

Because of the ground of our decision, we do not decide the merits of the legal arguments of either par-

ty. We decide that there is not sufficient proof in this record to hold that the District Court abused its discretion in the relief that was ordered, or in the failure to order all of the relief requested. Time may prove that the District Court was wrong, *i.e.*, that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. But until the affirmative relief the District Court has ordered has been given a chance to work, we cannot tell. There is no way that this Court can determine that the relief the Court ordered will not achieve the remedy to which the plaintiffs are entitled.

We cannot say, assuming the constitutionality of quota-based relief, a point that deserves serious consideration but which we do not reach, that such relief exceeds the needs of the situation.

It was not an abuse of discretion to order the discontinuance of one test and substitute another which the District Court concluded would serve to eliminate the discriminatory hiring practices.

All parties, both representatives of the plaintiffs' class and the defendants, must work diligently toward producing qualified black candidates with which to break the mold of discrimination. From the view of an appellate court, we cannot now say that this will not be adequately accomplished by the present decree. The Court has retained jurisdiction to make the decree work. If it has ordered too much, it may modify the decree when it appears necessary. If it has not ordered enough, it may change the decree to require such ad-

ditional relief as it determines to be necessary to remedy the wrong. There are no experts in the solution of problems created by racial prejudice. The eventual test of the remedial power of the District Court must lie in its reasonableness and in its workability. As Chief Justice Burger said in *Swann*:

> "The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term 'reasonableness.' In *Green, supra*, this Court used the term 'feasible' and by implication, 'workable,' 'effective,' and 'realistic' in the mandate to develop 'a plan that promises realistically to work, and ... to work *now*.' On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity."

402 U.S. at 31.

Like *Swann*, we cannot here determine that the order of the District Court is not a reasonable, feasible, and workable use of the Court's remedial power to make sure that never again will a person otherwise qualified for employment with the Highway Patrol be refused a job because of his or her race.

AFFIRMED.

APPENDIX

JUDGMENT AND ORDER FOR DECLARATORY AND INJUNCTIVE RELIEF

(Number and title omitted)

(Filed: Oct. 18, 1971)

This action having come on for final hearing before Honorable Walter L. Nixon, Jr., United States District Judge, on June 28 and 29, 1971, and the issues having been duly heard, and a decision having been duly rendered on September 29 1971,

It is, therefore, in accordance with the Court's decision of September 29, 1971, ORDERED, ADJUDGED AND DECREED:

A. *Declaratory Relief.* The Court declares that the plaintiffs and the members of the plaintiff class, defined as all qualified Negroes who have applied or will apply in the future for employment with the Mississippi Department of Public Safety and/or the Mississippi Highway Safety Patrol, all present Negro employees of the Department and the Patrol, and all future employees of the Department and the Patrol, have a right secured by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §§ 1981 and 1983 to be free from racially discriminatory employment practices of the defendants and have a right secured by the Constitution and laws of the United States to be free of any policy, practice, custom, or usage of the defendants or their successors in office of denying, abridging, withholding, conditioning, limit-

ing or otherwise interferring with the rights of plaintiffs and the plaintiff class to enjoy equal employment opportunity in hiring, training, assignment, transfers, promotion, retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed or national origin.

B. *Injunctive Relief.* The defendants herein, Governor John Bell Williams, Governor of Mississippi, Giles W. Crisler, Commissioner of Public Safety, J. D. Gardner, Chief of Patrol of the Mississippi Highway Safety Patrol, and Charles E. Snodgrass, Personnel Director of the Department of Public Safety, their officers, agents, servants, employees, attorneys and successors in office and those persons in active concert and participation with them, are hereby enjoined and restrained as follows:

1. From discriminating against plaintiffs or the class that they represent in the distribution, receipt and processing of all applications within the Department of Public Safety and within the Mississippi Highway Safety Patrol as sworn officers, clerical help, secretaries and all other employment positions, and no other individual shall be subjected to any racially discriminatory employment practice with the purpose of denying, abridging, withholding, conditioning, or otherwise interfering with the rights of applicants and employees of the Department to enjoy equal employment opportunity in hiring, training, assignment, and transfers, promotion and retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed or national origin. To this extent, the June 30, 1971 mem-

orandum from the defendant, Commissioner Giles W. Crisler to Charles E. Snodgrass and department heads of the Department of Public Safety in this regard, attached to the "Chronicle of Post-Trial Events" as Exhibit "A", and attached herein as Exhibit 1, shall be and shall remain in effect and be complied with in the future and to that extent so much of said memorandum shall be implemented pursuant to the Decree of this Court.

2. From continuing, maintaining or instituting any of the following racially discriminatory practices:

(a) failing and refusing to permit the applicants to apply for positions with the Department of Public Safety solely because of race or color, creed or national origin;

(b) requiring applicants for patrolmen positions as a condition to consideration for employment, to pass a standardized general intelligence test or the Otis Quick Mental Scoring Test or any other tests which have not been validated nor proved to be significantly related to successful job performance. To this end, all applicants for positions in the Department of Public Safety and the Highway Safety Patrol shall in the future be required to comply with the regulations adopted by the Classification Commission of the State of Mississippi established by the legislative Act found in Section 8935-14, Mississippi Code of 1942, as Recompiled and Amended, which covers all agencies including the Highway Patrol. All of the defendants and their successors in office in the Department and Patrol are hereby required to comply with the regulations adopt-

ed by the Classification Commission, including the giving of examinations which are standard nationally approved tests that are administered in an objective manner;

(c) applying to applicants for patrolmen positions, as a condition of hiring, vague and undefined subjective standards which may be used as a means of discriminating on the basis of race, color, creed or national origin without objective verification;

(d) failing and refusing to hire and train applicants for staff positions with the Department of Public Safety solely because of their race, color, creed or national origin;

(e) maintaining any departments, divisions and/or bureaus within the Department of Public Safety for Whites only;

(f) maintaining certain jobs and job categories within the Department of Public Safety for Whites only and others for Negroes only;

(g) failing and refusing to promote employees to positions of higher responsibility and benefits or to supervisory positions solely because of their race, color, creed or national origin;

(h) maintaining any physical facilities segregated on the basis of race or color; and

(i) otherwise applying terms and conditions of employment within the Department of Public Safety in a racially discriminatory manner.

3. From applying as a condition of employment, for the next five years from the date of this Decree, any new standards or qualifications for applicants more stringent than those applied, as a matter of practice, to employees hired since June 1, 1968, so that it will not be more difficult for future employees, blacks and whites, to be hired than it was for those employees hired since June 1, 1968.

4. From using application forms which ask questions or contain any information regarding the relatives, friends, and/or acquaintances of employees of the State of Mississippi, or the Department of Public Safety or the Mississippi Highway Patrol, and from providing or exhibiting any preference or favoritism toward any applicant for any position with the Department of Patrol because he has a relative, friend, or acquaintance employed by the State of Mississippi, or by the Department of Public Safety or the Highway Safety Patrol.

5. From showing or in any way utilizing any motion picture film including the film "Law Enforcement Officers' Training Academy" already barred by the Commissioner, or other similar visual aid to promote recruitment which emphasizes or implies that responsible positions or any other positions within the Department or Patrol are open to or held by whites only.

6. The defendants and their successors in office shall give all notices of and conduct all mental tests for examinations in conformance with the rules and regulations of the Mississippi Classification Commission. If those rules or regulations do not provide other-

wise, the defendants shall for a period of at least three months prior to the convening of each Patrol Recruit Training Class and at least thirty days prior to the filling of vacancies in other positions in the Department, advertise in newspapers and on radio and television throughout the State, including those particularly oriented to and providing maximum coverage to the black population, that applications are being received for patrolmen positions, or that vacancies exist for other positions in the Department, prominently indicating in each instance that applications will be received and considered without regard to race, color, creed or national origin; and shall also specify the exact mechanics and procedures to be followed in applying. All applications received within 45 days of the first publication of the above reference announcement shall be processed in the same manner as directed above and all applicants found to be qualified will be considered with all applicants who have previously qualified. Those applications received after the 45 days will be held and processed for the next scheduled class. However, positions on the Patrol and in other bureaus of the Department may be filled without advertising on a temporary basis to fill emergency needs. Copies of all such advertising, names of news media employed, and the dates of such advertising shall be kept in a permanent file by the Departmental custodian of records, open to public inspection at all reasonable times.

7. Any visits for purposes of recruitment by any employees of the Department of Public Safety and/or the Mississippi Highway Safety Patrol or by anyone else for the purpose of securing employees for the De-

partment or Patrol to colleges, churches, civic clubs, etc. shall be done in such a manner as to achieve maximum coverage to potential applicants or employees on a nondiscriminatory basis, such recruitment efforts to be made at as many predominantly black colleges, junior colleges and high schools within the state as nearly as feasible and practicable.

8. To comply with Addendum I-A to the Departmental Rules and Regulations, Public Relations, attached as Exhibit "C" to the "Chronicle of Post-Trial Events" filed by the plaintiffs, and attached herein as Exhibit 2, with reference to restrictions and prohibitions of the use of any racial terms and epithets which are humiliating, derogatory and insulting to anyone because of their race, color, creed or national origin.

9. To make the following reports and maintain the following records:

(a) Records showing the name, address, race and date of application and disposition of the application of each person applying for or seeking an application for any position with the Department or Patrol and retain each such application form for a period of three years from the date of this Decree, and such records shall be public records in the office of the defendants subject to review, inspection and copying during regular business hours, in a manner which does not unduly interfere with the conduct of normal business.

(b) The defendants and their successors in office shall also maintain a public record during the next five years from the date of this Decree listing the name, race, position and pay rate of all employees

of the Department of Public Safety and the Highway Safety Patrol, and especially showing which employees have been newly hired, promoted, demoted and discharged during this reporting period.

C. Plaintiffs' request for specific relief, including an injunction requiring the defendants to hire and train them for positions for which they sought application forms in June, 1970, and back pay and other benefits lost as a result of defendants' refusal to provide them with application forms in June, 1970, is hereby denied, except that the plaintiffs are entitled to the protection of the injunctive relief as stated above.

D. Plaintiffs' request for such affirmative relief as would require the defendants to increase the number of black officers on the Mississippi Highway Patrol, by minority preference or a racial quota system, to the end that the percentage of blacks on the Patrol does not significantly differ from the percentage of blacks in the population of the State of Mississippi, is hereby denied.

F. All taxable court costs herein are taxed against the defendants, and defendants are hereby ordered to pay to plaintiffs attorney's fees in the amount of $500.00.

G. This Court shall retain jurisdiction of this action to enforce compliance with its Decree entered herein and for any further action as may be necessary.

H. The defendants are hereby ordered to post or cause to be posted this Judgment and Order for Dec-

laratory and Injunctive Relief on regular informational bulletin boards in all Patrol and Department installations throughout this State, including their Jackson Headquarters, for a period of 30 days immediately after entry of this Decree, and the defendants and their successors in office are hereby ordered to instruct each division and bureau chief of the Department of Public Safety to instruct all employees under their supervision to familiarize themselves with the terms of this Court's Decree.

I. The Clerk is directed to mail by certified mail, return receipt requested, a certified copy of this Judgment and Order for Declaratory and Injunctive Relief to each of the parties, by their attorneys, and such mailing shall constitute notice to the plaintiffs and the defendants and their successors in office of the terms of the Judgment and Order.

ORDERED, ADJUDGED, AND DECREED on this the 14th day of October, 1971.

/s/ Walter L. Nixon, Jr.
UNITED STATES
DISTRICT JUDGE

GOLDBERG, Circuit Judge, concurring in part and dissenting in part:

I concur in the Court's opinion insofar as it affirms the district court's finding of class discrimination. From that part of the Court's opinion that denies any

affirmative hiring relief to the class, I must, with profound sorrow, dissent.

As the majority recognizes, despite a state population that has 42% Black in 1960 and 36.7% Black in 1970, "the Mississippi Highway Patrol has never in its history employed a member of the Negro Race as a sworn officer." The district court and the majority agree that this racial void was the result of "racially discriminatory policies and practices of the defendants" and that such policies and practices are violative of the Fourteenth Amendment. In fashioning relief, however, the district court refused to order any affirmative hiring relief, and it did so without any explanation for its inaction.[1]

The barriers to black entry into the Highway Patrol that defendants erected and tolerated have been formidable. The district court found, *inter alia:*

> 1. "Neither the Department of Public Safety nor the Highway Safety Patrol does any public advertising or makes any public announcements when job vacancies become available. Most of the patrolmen presently employed by the Patrol learned of vacancies and the fact

[1]The district court's entire recital on this point was:

> "D. Plaintiffs' request for such affirmative relief as would require the defendants to increase the number of black officers on the Mississippi Highway Patrol, by minority preference or a racial quota system, to the end that the percentage of blacks on the Patrol does not significantly differ from the percentage of blacks in the population of the State of Mississippi, is hereby denied."

that applications were being accepted through word-of-mouth inquiry from patrolmen who are their friends or relatives, and the majority of the clerical positions in the Department are filled by walk-ins, many of whom are recommended by present employees."

2. "The employment application forms utilized by the Department and the Patrol require an applicant to list his relative employed by the State of Mississippi and his friends or acquaintances employed by the Patrol. Of the 107 Whites hired as patrolmen since January 1, 1968, all but twelve listed friends or acquaintances employed by the Patrol, and forty-two listed relatives employed by the State of Mississippi. Although there are communication media in the State of Mississippi, including television, radio and newspapers which reach a large portion of the Black community, neither the Department nor the Patrol has advertised the availability of jobs in any of these media or in any other news media in the State of Mississippi. The officers of the Public Relations Bureau of the Department present recruitment programs, including speeches, to civic clubs, church groups and student groups throughout the state. Included in those programs are presentations on "the law enforcement profession" which includes a description of the employment opportunities and qualifications for positions with the Department and the Patrol. The audiences for such programs have been pre-

dominantly White. A color motion picture film, apparently produced prior to January 1, 1968, which shows the physical plant and training operations of the Training Academy, has been available at the Patrol's public relations bureau and has been shown to groups of students as part of "career day" programs in school in the State. In this film, which at the time of the time of trial of this case had been ordered by Commissioner Crisler not to be shown again, all of the recruits, officers, instructors, Academy personnel and other persons are White, with the exception of Black cooks and food servers in the cafeteria."

3. "Until shortly before the trial of this case, the Department had no written rules or regulations prohibiting the use of racial terms or epithets by patrolmen, and the term "nigger" had at times been used by patrolmen in addressing Blacks."

4. "The Mississippi Department of Public Safety and the Mississippi Highway Safety Patrol have had a reputation throughout the State of Mississippi, and particularly among the Black communities, as being an all-White Department and Patrol, which has discouraged Blacks, with the exception of the two named plaintiffs, Coker, and probably only a few others, from applying for membership, particularly as sworn officers of the Patrol, by virtue of the fact that there have never been any Black sworn officers on the Patrol. This in part

> has resulted from the fact that the application forms provide for a listing of relatives employed by the State of Mississippi and friends and acquaintances on the Patrol and within the Department of Public Safety, the former being all-White and the latter being almost all-White. Favoritism and partiality has been shown to those applicants having relatives, friends and acquaintances on the all-White Patrol."

Although there is a hint of some progress during the last two years, the conclusion seems inescapable that the Patrol's past discriminatory practices have left a legacy whereby Mississippi Blacks could have little, if any, reason to believe they would be accepted for employment on the Patrol. *See United States v. Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 457-58. In short, it is impossible to believe that an injunctive order that does little more than require defendants to "stop discriminating" will result in the effective remedial vindication of the rights found violated here. In the words of Justice Holmes, "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 1921, 256 U.S. 345, 349.

Both plaintiffs and the United States Department of Justice, as *amicus curiae*, have prayed for this Court to mandate some form of affirmative hiring relief. I believe the Department of Justice has succinctly and correctly stated in its brief the primary issue before us on this appeal:

> "Whether the district court, after holding that defendants were engaged in a pattern and

> practice of racial discrimination and finding that the defendants' 'all-white' reputation among black citizens in Mississippi has discouraged blacks from applying, erred in failing to order an affirmative minority hiring goal to correct the effects of past discrimination by the defendants and their predecessors."

From my reading of the district court's findings and the record in this case, I am thoroughly convinced that the relief granted by the district court and affirmed by the majority is wholly inadequate to remedy the constitutional deprivations alleged and proven by plaintiffs.

This Court has long recognized that in cases of employment discrimination it is often necessary to order affirmative relief in order to insure that the effects of the *past* discrimination are overcome. In *Local 53 of the International Assoc. of Heat & Frost Insulator & Asbestos Workers v. Vogler*, 5 Cir. 1969, 407 F.2d 1047, an employment discrimination case granting broad affirmative relief, Judge Dyer stated:

> "In formulating relief from such practices the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' *See* United States v. Louisiana, E.D. La. 1963, 225 F.Supp. 353, 393, aff'd, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709."

407 F.2d at 1052. *See also United States v. Jacksonville Terminal Co., supra,* 451 F.2d 418, 455, 458; *United States v. Georgia Power Co.*, 5 Cir. 1973, ____ F.2d ____ (slip op. No. 71-3293, Feb. 14, 1973, at 44).[2]

This well established concept of affirmative relief, commonly applied in all areas of racial discrimination is not, as defendants claim, creating some new form of invidious discrimination in favor of Blacks. Rather, it is a recognition of the fact that to simply order an end to discrimination is often inadequate — more is required to right the past wrongs effectively. The notion of "transitional protective measures," which requires a temporary suspension of traditional requirements of "color blindness," have been authoritatively accepted, if not required, as a means of achieving benign constitutional objectives.

> "As we have stated often before, federal courts have an affirmative duty to order broad remedial relief where necessary to correct the effects of a pattern and practice of racial discrimination. Louisiana v. United States, 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709; Adams v. Miami Police Benevolent Ass'n, Inc., supra; Local 53 of International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir. 1969, 407 F.2d 1047; United States v. Jefferson County Board of Education, 5 Cir. 1966, 372 F.2d 836."

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[2] *Cf. Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965): "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *See also* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

Smith v. Young Men's Christian Ass'n of Montgomery, 5 Cir. 1972, 462 F.2d 634, 649. *See also Swann v. Charlotte-Mecklenburg Bd. of Educ., supra; Long v. Georgia Kraft Co.*, 5 Cir. 1972, 455 F.2d 331.

In requiring affirmative hiring relief, we would not be saying that Blacks must forever be favored over Whites. We would simply say that unless some transitional affirmative relief is required, the severe constitutional deprivations that have already occurred will never be remedied. As Chief Justice Burger makes clear in *Swann, supra*, 402 U.S. at 31-32, affirmative transitional measures are necessary only until past vestiges of discrimination have been removed. Where the vestiges of past discrimination are as obvious and extensive as in the instant case, I would read *Swann* as saying that not only is affirmative relief permissible, but that it is also *required*.

In a recent case that is strikingly similar to the case *sub judice*, the Eighth Circuit, sitting *en banc*, ordered the Minneapolis Fire Department to hire Blacks on a one to two basis until an appropriate number of qualified Blacks had been hired. *Carter v. Gallagher*, 8 Cir. 1971, 452 F.2d 315. As is our case, *Carter* was based on 42 U.S.C. §§ 1981 and 1983, and the court there used the Title VII cases as authority for the proposition that transitional affirmative relief was both appropriate and necessary. In modifying the district court's order, the Eighth Circuit stated:

> "The absolute preference ordered by the trial court would operate as a present infringe-

ment on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices. Louisiana v. United States, *supra*. To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area. Such a procedure does not constitute a "quota" system because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions. However, as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, more than a token representation should be afforded. For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without deny-

ing the constitutional rights of others by granting an absolute preference."

Carter v. Gallagher, supra, 452 F.2d at 330-31. It is instructive to note that in *Carter* the Blacks constituted a considerably small percentage of the general population (approximately 4%) and that the stigma of discrimination that emanated from the Minneapolis Fire Department did not approach the level of the all-white legacy of the Mississippi Highway Patrol. Nonetheless, a majority of that Circuit recognized the appropriateness of ordering affirmative hiring relief.

Similarly, in *Castro v. Beecher,* 1 Cir. 1972, 459 F.2d 725, the First Circuit modified a district court order upon finding that certain preferential hiring relief was necessary in order to alleviate the past discriminatory practices of the Massachusetts Police:

"As to the class now before us, those black and Spanish-surnamed applicants who failed one or more of the examinations given during the period from 1968 to 1970, we feel that some form of compensatory relief is mandated. *See, e.g.,* Carter v. Gallagher, *supra,* 452 F.2d at 328-31.[15] We recognize that any such effort is bound to be a crude one and must be pursued with sensitivity and restraint. The district court has ordered that a non-discriminatory and job predictive test be developed. In our view, if relief in the near future is to be more than token, further provision is necessary."

459 F.2d at 736-37. The Court suggested the use of priority pools and hiring by ratio as appropriate remedial measures. *Id.* at 737. There are countless other cases that have required considerably broader affirmative relief than that accorded here. *E.g., United States v. Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 117; *United States v. Ironworkers Local 86*, 9 Cir. 1971, 443 F.2d 544, *cert. denied*, 404 U.S. 484; *United States v. St. Louis-San Francisco Ry. Co.*, 8 Cir. 1972, 464 F.2d 301.

The blatant statistical evidence and the long undeviating policy of discrimination, when combined with the important public character of the Highway Patrol, create a need for affirmative relief that is equal to if not greater than that present in many earlier employment discrimination cases. Today's decision affirming the denial of affirmative relief is, in my opinion, an unfortunate step backward in the fight for racial equality.

The majority, while recognizing the gross effects of the past discrimination, studiously avoid the issue of the propriety of ordering affirmative relief by adopting an attitude of appellate deference that is unprecedented in this Circuit in the civil rights area. The two cases cited by the majority, *Swann* and *Smith*, do indeed say that the district court has broad discretion in fashioning appropriate remedies for racial discrimination. Both of these cases, however, affirmed district court decisions that *had ordered broad affirmative relief*. The deference that was being paid on appeal — rejecting claims that the relief had been too extensive — was that the precise contours of affirmative relief

are best left to the district court. *See also Adams v. Miami Police Benevolent Ass'n, Inc.*, 5 Cir. 1972, 454 F.2d 1315. They should not be read as holding that the question of affirmative relief *vel non* is purely a matter of district court discretion.

While it is certainly axiomatic that the trial court traditionally exercises broad discretion over the details of injunctive relief, where, as here, there is a constitutional deprivation proven and found but not remedied, I believe the "chancellor's foot" must defer to the need for *effective* constitutional vindication. As we have only too often experienced in cases of racial discrimination, the nature of the remedy is often the only relevant substantive issue at stake, and to permit broad notions of "discretion" to supplant our duty to insure effective relief is an unfortunate abdication.

The unfairness and unfeasibility of the majority's opinion is well illustrated by a recent case, with almost identical facts, where the federal district court in Alabama ordered broad affirmative hiring relief in favor of black plaintiffs who had suffered identical hiring discrimination at the hands of the Alabama State Troopers, *N.A.A.C.P. v. Allen*, M.D. Ala., 1972, 340 F.Supp. 703.[3] The sharp contrast of that relief with

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[3]Judge Johnson, in Allen, correctly stated the duty of the district court as follows:

> "Under such circumstances as exist in these cases, the courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. Hutchins v. United States Industries, Inc., 428 F.2d 303, 310 (5th Cir. 1970); Local 53,

the *lack* of affirmative relief granted below in this case is all too clear. The difference can hardly be attributed to minute differences in the facts of the cases, and it is apparent to me that in the Alabama case the plaintiffs were victorious and here the victory is one in form only. This disparity in substantive relief, presumably

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Asbestos Workers v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969). The racial discrimination in this instance has so permeated the Department of Public Safety's employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects."

340 F.Supp. at 705-06. Included, *inter alia*, in the injunctive order were the following provisions:

"III. It is further ordered that the defendants be and they are each hereby enjoined from failing to hire and permanently employ after the probationary period, one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes. This injunction applies to the cadet and auxiliary troopers as well as to the regular troopers. It shall be the responsibility of the Department of Public Safety and the Personnel Department to find and hire the necessary qualified black troopers.

"IV. It is further ordered that the defendants be and they are hereby enjoined from conducting any training courses for the purpose of training new troopers until the groups to be given said training courses are comprised of approximately twenty-five (25) percent black trooper candidates.

"V. It is further ordered that the defendants be and they are each hereby permanently enjoined from failing to hire supporting personnel for the Department of Public Safety in the ratio of one Negro for each white until approximately twenty-five (25) percent of the supporting personnel are black. The decree in United States v. Frazer, 317 F.Supp. 1079 (M.D.Ala. 1970) is hereby amended insofar as the Department of Public Safety's employment practices are concerned."

Id. at 706.

perfectly acceptable under the deferential approach taken by the majority, has the effect of allowing important constitutional rights to hinge solely on the length of the "chancellor's foot." I am unable to accept such a result.

In *United States v. Hayes International Co.*, 5 Cir. 1969, 415 F.2d 1038, this Court reversed a district court's denial of a preliminary injunction and ordered affirmative relief for black plaintiffs. Judge Tuttle stated:

> "It is true that this court has followed the view that an injunction does not follow as a matter of course upon either a finding or stipulation of violation of some Act of Congress. Mitchell v. Ballenger Paving Company, Inc., 299 F.2d 297, 300 (5th Cir., 1962). However, it is equally true that this court has consistently held that the decision of the lower court is subject to review and where it is clear that its discretion has not been exercised with an eye to the purpose of the Act, Wirtz v. B. B. Saxon Company, 365 F.2d 457, 462 (5th Cir., 1966); Shultz v. Parke, 413 F.2d 1364 (5th Cir., 1969), or exercised in light of the objective of the act, Mitchell v. Ballenger Paving Company, Inc., supra, we have nevertheless not hesitated to reverse an order of the trial court denying an injunction without the need of a discussion of abuse and discretion."

415 F.2d at 1044-1045. The Court went on to say

> "Moreover, we hold as did the court in Vogler v. McCarty, Inc., 294 F.Supp. 368, 372 (E.D.

> La. 1967) affirmed 407 F.2d 1047 (5th Cir., 1969) that where an employer has engaged in a pattern and practice of discrimination on account of race, etc., in order to insure the *full* enjoyment of the rights protected by Title VII of the 1964 Civil Rights Act, affirmative and mandatory preliminary relief is required."

Id. at 1045. More recently, in broadening the injunctive relief granted by a district court, Judge Tuttle stated:

> "Full enjoyment of Title VII rights sometimes requires that the court remedy the present effects of past discrimination. *See Louisiana v. United States*, 380 U.S. 145, 154 (1965). This includes both redressing the continuing effects of discriminatory seniority systems, Local 189, *United Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Jacksonville Terminal Co., supra; United States v. Hayes International Corp., supra*, and affirmative action to alter a seniority system which is not discriminatory on its face. If the present seniority system in fact operates to lock in the effects of past discrimination, it is subject to judicial alteration under Title VII. Local 53, *International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 497 F.2d 1047, 1052 (5th Cir. 1969); Local 153, *supra* at 991."

United States v. Georgia Power Co., supra (slip op. at 44).

Finally, the approach of a unanimous Supreme Court in a civil rights case in which the defendants argued that the district court's equitable discretion should not be disturbed, is instructive:

> "Since the city has completely failed to demonstrate any compelling or convincing reason requiring further delay in implementing the constitutional proscription of segregation of publicly owned or operated recreational facilities, there is no cause whatsoever to depart from the generally operative and here clearly controlling principle that constitutional rights are to be promptly vindicated. The continued denial to petitioners of the use of city facilities solely because of their race is without warrant. Under the facts in this case, the District Court's undoubted discretion in the fashioning and timing of equitable relief was not called into play; rather, affirmative judicial action was required to vindicate plain and present constitutional rights. Today, no less than 50 years ago, the solution to the problems growing out of race relations 'cannot be promoted by depriving citizens of their constitutional rights and privileges,' Buchanan v. Warley, supra (245 US, at 80, 81)."

Watson v. Memphis, 1963, 373 U.S. 526, 539.

The majority states the issue *sub judice* as being "whether the district court granted sufficient equitable relief to eliminate the discriminatory effects of the past as well as to bar like discrimination in the future." It is perfectly clear to me that the district court did not grant "sufficient equitable relief." I cannot agree with the majority's statement that "there is no showing in this record that the relief granted will not remedy the wrong." Where the effects of past discrimination have been as devastating and socially significant as in this case, I am unaware of any precedent for placing this sort of burden on a plaintiff who has successfully proven a violation of constitutional rights and is seeking appropriate relief. In a recent case, *E.E.O.C. v. Rogers Bros., Inc.*, 5 Cir. 1972, 470 F.2d 965, Chief Judge Brown vacated a district court order in a Title VII case that had failed to give adequate injunctive relief, and spoke to this problem:

> "While this record contains abundant evidence that the defendants have consistently declined in the past to submit the required reports, we are unwilling to make the initial forecast of what their course may be in the future. Nevertheless, we may hold on these facts that injunctive relief is mandatory unless the District Court finds on the basis of clear and convincing proof that there exists no reasonable probability of further non-compliance with the reporting provisions of the Act. United States v. Edwards, *supra*. The burden of negating that probability lies with the defendants, and in these circumstances it will be a monumental one."

470 F.2d at 966-967. *See also Cooper v. Allen*, 5 Cir. 1972, 467 F.2d 836, 840 (burden of clear and convincing proof on employer). In any event, the statement in the majority that "if it [the district court] has ordered *too much*, it may modify the decree when it appears necessary," (emphasis added) only underscores the sharp disagreement I have with the majority's perception of the case.

The approach taken by the majority — if this fails to work we can always try a little more, or presumably, a little less, in the future — fails to give the relief consistently vouchsafed by this Court's approach to civil rights matters over the last decade. In school cases we have ordered integration now, *e.g., Davis v. Bd. of School Comm'rs.*, 1971, 403 U.S. 33, 38. We have ordered broad affirmative relief in cases involving housing discrimination, *see e.g., United States v. West Peachtree Tenth Corp.*, 5 Cir. 1971, 437 F.2d 221, 228-29, voting rights, *Louisiana v. United States, supra*, and most importantly we have always required effective and non-dilatory affirmative remedies in cases of employment discrimination. The order affirmed by the majority does not obligate the defendants to hire *any* Blacks. It ignores the long history of discrimination that will invariably operate as a strong deterrent to black interest in the Patrol. For the district court to withhold affirmative hiring relief in a case with such important constitutional rights at stake is without question an abuse of discretion.

Recognizing the primacy of the district court's role in fashioning equitable relief, the proper result here

would have been to remand the case to have the district court, in the first instance, fashion appropriate affirmative hiring relief that would be both immediate and meaningful. The possible alternatives are broad — temporary one-to-one hiring, the creation of priority hiring pools, a freeze on white hiring until the Patrol is effectively integrated, or any other form of affirmative hiring obligation — but to place the defendants under no obligation whatsoever, as was done here, is clearly insufficient. I emphasize that the affirmative relief would be on a transitional basis and would be operative only until the barriers, both real and psychological, are removed. The Patrol would not have to "lower" its hiring standards, and the court could not order the employment of genuinely unqualified Blacks. But the record makes clear that there *are* qualified Blacks, willing and able to be employed, and the court's order should have required the hiring of at least some Blacks.

In order to overcome the still present badges of slavery, badges of freedom must *now* be festooned on the uniforms of some Blacks, even if those badges be as symbols of real and genuine equality to come. The Constitution generally commands in the present tense and is not stilled by pious hopes for future days of freedom. Appellate courts rightly give much latitude and longitude to the trial courts' exercise of discretion, but here we see only immobility after years of circumventing the latitudinal and longitudinal geodetics of our revered Constitution.

It is statistically inconceivable that in 1973 no Black in Mississippi could be found willing and capable of

becoming a patrolman. We should not be blinded by the words of promise for tomorrow, even though they be in injunctive terms. *Today* is the day for action, but the court below, in its "discretion," did not even put a time limit, much less any firm obligation on the defendants, to end the continued desecration of the Constitution.

Even if the relief be de minimis, let there be some light shone on the roadway to constitutional equality. Even momentary tokenism is preferable to absolute negation, and the latter is all that I find in the ordering words of the trial court. It is a sad, sad day indeed for the Blacks of Mississippi to be told that in some glimmering future hour tests will be devised and methods will be achieved whereby they will be accorded some degree of the equality that the Constitution has guaranteed to them since the tragic days of the Civil War.

The majority opinion addresses itself exclusively to the future, as though some doctrine of condonation or purging is effected by an injunctive order in futuro that promises to conform some day to constitutional standards. This is too little and too late. We are under a judicial demarche to begin *now* to unbind the chains of slavery. It is insufficient to leave it to a locksmith in some unforseen tomorrow to fashion a key to unlock the chain. The chain must be sundered *today* — nothing less than *today* can satisfy our duty to cure the stultifying past. Believing that we should remand the case for further consideration of affirmative hiring relief, I dissent.

APPENDIX "B"

INDEXED

Willie L. MORROW and Jerome Mangum, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants-Cross Appellees,

v.

Giles CRISLER, Commissioner of Public Safety of Mississippi et al., Defendants-Appellees-Cross Appellants.

No. 72–1136.

United States Court of Appeals, Fifth Circuit.

March 27, 1974.

Civil rights suit was brought to enjoin racial discrimination in employment and working conditions of Mississippi Highway Patrol. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., entered a declaratory and injunctive decree in favor of plaintiffs and the plaintiffs appealed on ground that they were not afforded sufficient relief and defendants cross-appealed. The Court of Appeals affirmed, 479 F.2d 960. On rehearing en banc, the Court of Appeals, Gewin, Circuit Judge, held that evidence established that declaratory and injunctive relief granted plaintiffs would not remedy racial discrimination found to exist in hiring and employment practices of Mississippi Highway Patrol and suit would be remanded to the district court to fashion an appropriate decree which would have the certain result of increasing the number of blacks on the highway patrol. The Court further set forth certain guidelines for the district court in fashioning its decree for affirmative hiring relief.

Affirmed and remanded.

Synopses, Syllabi and Key Number Classification
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Brown, Chief Judge, concurred and filed opinion in which Wisdom, Circuit Judge, joined.

Clark, Circuit Judge, concurred and filed opinion.

Roney, Circuit Judge, concurred specially and filed opinion in which Bell and Ainsworth, Circuit Judges, joined.

Coleman, Circuit Judge, dissented and filed opinion.

Gee, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Civil Rights ⇐46
Courts ⇐406.9(8)

Evidence established that declaratory and injunctive relief granted plaintiffs would not remedy racial discrimination found to exist in hiring and employment practices of Mississippi Highway Patrol and civil rights suit would be remanded to the district court to fashion an appropriate decree which would have the certain result of increasing the number of blacks on the highway patrol.

2. Courts ⇐406.9(8)

On remand of civil rights suit to fashion an appropriate decree which would increase number of blacks on Mississippi Highway Patrol, district court would be directed to order that additional appropriate recruitment measures be taken to insure that black applicants will be attracted to the force, that the department's hiring criteria be reexamined and to grant some affirmative hiring relief such as, within bounds of discretion, temporary one-to-one or one-to-two hiring, the creation of hiring pools or freeze on white hiring or some other form of affirmative hiring relief until the patrol is effectively integrated.

3. Civil Rights ⇐46

In effecting affirmative hiring relief to insure that the number of blacks on the Mississippi Highway Patrol be increased, it is not required that the proportion of blacks on the patrol mirror the proportion of blacks in the population.

4. Civil Rights ⇐43

Mississippi Highway Patrol would have burden to prove that the residual effect of past discrimination has in fact been eliminated by new hiring practices.

5. Civil Rights ⇐43

Prior to cessation of affirmative hiring programs by the Mississippi Highway Patrol, where any black individual challenges the patrol's refusal to employ him, the patrol must show that such refusal was for legitimate job-related reasons.

6. Civil Rights ⇐46

Affirmative hiring program to eliminate racial discrimination which the Mississippi Highway Patrol must submit to the district court must be one that works and works now with discriminatory hiring policies eliminated and the evils of their existence eradicated.

7. Civil Rights ⇐46

Plaintiffs in civil rights action for declaratory and injunctive relief with respect to hiring practices of the Mississippi Highway Patrol were entitled to attorney's fees in an appropriate amount to be determined by the district court.

Appeals from the United States District Court for the Southern District of Mississippi.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

GEWIN, Circuit Judge:

This case involves racial discrimination in the employment practices of the Mississippi Highway Patrol. There being no question that the Highway Patrol has historically engaged in unconstitutional discrimination in the employment of patrolmen, the only question that brought this case *en banc* is whether the District Court ordered sufficient affirmative re-

lief to eradicate the State's unconstitutional employment practices and their effects.

[1] Experience since the entry of the decree provides this Court on rehearing with the hindsight to determine what was fathomed by foresight in the dissent from the panel opinion: the relief ordered by the District Court is insufficient. When this case was heard by the original panel in June 1972, the Highway Patrol had four black patrolmen. By the time the case was heard by the *en banc* Court in October 1973, there were six black patrolmen—six black patrolmen hired since entry of the decree during a period when 91 patrolmen were added to a total force of approximately 500 troopers.

These figures alone negate the State's argument that its present practices are nondiscriminatory, and give no support whatsoever to any argument that the decree appealed from is sufficient to eliminate the effects of past racial discrimination. Although we have difficulty seeing how any good faith argument could be made that the State has fulfilled the spirit, intent, and purpose of the District Court decree, counsel reported at oral argument before the *en banc* Court that the Highway Patrol has fully complied with the precise terms of the order. This illuminates plaintiffs' argument that the District Court must order additional specific relief if the Mississippi Highway Patrol's employment practices are ever to pass constitutional muster.

The controlling facts of the case and the District Court's decree are fully set forth in the panel opinions reported at 479 F.2d 960 (5th Cir. 1973). The majority affirmed the decree on the ground that it did not appear that the relief granted was inadequate to remedy the constitutional wrong. It was noted that

> Time may prove that the District Court was wrong, *i. e.*, that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. . . . The Court has retained jurisdic-

> tion to make the decree work. If it has ordered too much, it may modify the decree when it appears necessary. If it has not ordered enough, it may change the decree to require such additional relief as it determines to be necessary to remedy the wrong.

479 F.2d at p. 964. The undisputed results of the decree as reported to us on rehearing prove that the District Court was wrong, and the *en banc* Court now decides that the case should have been and must now be remanded for the District Court, in the first instance, to fashion an appropriate decree which will have the certain result of increasing the number of blacks on the Highway Patrol. Although we are mindful of our limited role in fashioning equitable decrees, we deem it fitting to adumbrate guidelines to aid the District Court.

The appellees represent that they have hired every black applicant who has met qualifications for employment. If this be true, it is apparent that either the qualifications are discriminatory in effect, or the State has not conducted a sufficient recruitment campaign to enlist blacks who meet those requirements. It is the recruitment and the hiring criteria that the District Court should scrutinize on remand.

[2] The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices. To counteract this reputation, the District Court ordered the Patrol to conduct an affirmative recruitment program. The efficacy of this program is belied by appellees' assertion that qualified blacks are not in fact applying for positions. Since we are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi, on remand the District Court should order that additional appropriate recruitment measures be taken to insure that black applicants will be attracted to the force.

The Department's hiring criteria should also be reexamined. Employment is presently conditioned upon possession of a high school diploma and passage of the Army General Classification Test, neither of which has been validated as a proper job requirement despite the fact that their propriety has been called into question. It may be that the diploma and test score requirements (a score of 110) are higher than needed to qualify those applicants who can perform the work of a Highway Patrolman. Such tests should be job validated. Moreover, the state should be required to defend by clear and convincing evidence the necessity of any additional objective requirements which black applicants have difficulty in satisfying.

Beyond insuring that objective hiring criteria are utilized, it will be incumbent on the District Court to order some affirmative hiring relief. It may, within the bounds of discretion, order *temporary* one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated. We emphasize, however, that the imposition of some affirmative hiring relief need not inexorably lead to the dilution of valid employment qualifications.

[3–5] The duration of the affirmative hiring relief shall be determined by the District Court. When it is convinced that the measures undertaken by the Patrol effectively offset the effects of past discrimination, such affirmative hiring relief can be terminated. It is not required that the proportion of blacks on the Patrol mirror the proportion of blacks in the population. However, in view of the protracted and pervasive discrimination practiced by the Department and the inefficacy of the prior decree in producing a more integrated Patrol, the burden will be upon the Patrol to prove that the residual effect of past discrimination has in fact been eliminated. Moreover, prior to the cessation of affirmative hiring programs, where any black individual challenges the Patrol's

refusal to employ him, the Patrol must show that such refusal was for legitimate job related reasons.

[6] Upon completion of its scrutiny of the recruitment program and hiring criteria consistent with the aforementioned principles, the District Court should require the Department to fashion and submit for immediate approval and subsequent periodic review a plan which incorporates the District Court's mandates. As we have said in other contexts involving discrimination, the plan submitted to the District Court and subject to its ultimate enforcement must be one that works and works now. Discriminatory hiring policies must be eliminated and the evils of their existence eradicated. Nothing less is countenanced by the applicable law.

Competition is keen for able and competent blacks in the law enforcement area. Salaries are limited by legislative enactment. Public bodies cannot fully engage in salary and benefit competition which is available to the private sector. From the record in this case, it is obvious that the Highway Patrol probably cannot successfully engage in this competition through mere mechanical obedience to the words of a judicial decree. Imaginative initiative is needed from all present members of the Highway Patrol.

To achieve success in this case, the plaintiffs and the defendants need to fully cooperate with each other and with the Court. The plaintiffs, as a class, seeking equity must do equity and might well be required to give full assistance in the recruitment of qualified black applicants.

This case is remanded to the District Court for such immediate interim orders, further proceedings, and final action as may be consistent with this opinion.

[7] The panel opinion is affirmed as to the individual appeals. The District Court shall reconsider the award of the amount of attorney's fees, and shall award such fees as may be appropriate for this appeal and further proceedings. *See* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th

Cir. 1974); Clark v. American Marine Corp., 320 F.Supp. 709, aff'd, 437 F.2d 959 (5th Cir. 1971).

Remanded.

BROWN, Chief Judge, with whom WISDOM, Circuit Judge, joins (concurring):

Although I have joined without reservation in Judge Gewin's opinion for us, I write this concurrence to respond to Judge Clark's concurrence. Although perhaps literally directed to race-selective hiring his insistence that by this action "we break judicial new ground in this Circuit" leads me to read it broadly as asserting that this is so wholly unprecedented that were it not for the vast body of law from sister Circuits his doubts "that its constitutional validity can be reasonably articulated" would have led him to dissent. But this is not new and startling. Rather than followers we have been in the van. We are not Johnny-come-latelys to the eradication of racial discrimination through race conscious means.

I wish to put the Court's decision in proper historical perspective. In voting rights cases of the early 1960's, this Court adopted what has been characterized as the *deep freeze* principle, a remedy designed to ensure that until all traces of discrimination against blacks were removed, blacks would be accorded the same treatment as that accorded whites in the era of discrimination. The object was to give blacks this right to catch up. To achieve that goal, blacks had to be dealt with as blacks.[1]

1. United States v. Duke, 5 Cir., 1964, 332 F.2d 759; United States v. Mississippi, 5 Cir., 1964, 339 F.2d 679; United States v. Ward (Miss.), 5 Cir., 1965, 345 F.2d 857; United States v. Ramsey, 5 Cir., 1965, 353 F.2d 650; United States v. Mississippi (Walthall County), 5 Cir., 1964, 339 F.2d 679; United States v. Ward (Louisiana), 5 Cir., 1965, 349 F.2d 795, modified on rehearing, 352 F.2d 329; United States v. Lynd, 5 Cir., 1962, 301 F.2d 818, cert. denied, 1963, 371 U.S. 893, 83 S.Ct. 187, 9 L.Ed.2d 125; Kennedy v. Lynd, 5 Cir., 1962, 306 F.2d 222, cert. denied, 371 U.S. 952, 83 S.Ct. 507, 9 L.Ed.2d 500; United States v. Lynd, 5 Cir., 1965, 349 F.2d 785; United States v. Alabama, 5 Cir., 1962, 304 F.2d 583, cert. granted, judgment af-

While Judge Clark recognizes the Court's use of "color conscious" relief to remedy discrimination in the schools, we have imposed ratios in hiring of teachers and replacement of those displaced by desegregation orders.[2]

Similarly, under Title VII we have frequently sanctioned use of the race conscious "rightful place theory" under which incumbent black employees may use plant, company or terminal seniority despite a collective bargaining agreement mandate of job, unit or craft seniority in order to eradicate the present effects of past discrimination.[3] Furthermore, we have approved of an interim one-for-one black-white referral system pending the development of objective Union membership criteria.[4]

Likewise in grand and petit jury selection cases we have many times held that to achieve the constitutional goal of a

firmed, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112; United States v. Dogan, 5 Cir., 1963, 314 F.2d 767; Toney v. White, 5 Cir., 1973, 476 F.2d 203, modified and affirmed en banc, 488 F.2d 310. Similar relief was made available through three-Judge courts within the Circuit. See United States v. Louisiana, E.D. Louisiana, 3-Judge, 1963, 225 F.Supp. 353, affirmed, 380 U.S. 145, 155–156, 85 S.Ct. 817, 823, 13 L.Ed.2d 709, 716; United States v. Mississippi, S.D.Miss., 3-Judge, 1964, 229 F.Supp. 925, reversed and remanded, 1965, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717. This principle of freezing was legislatively prescribed in the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C.A. §§ 1973b(a), 1973c.

2. United States v. Jefferson County Board of Education, 5 Cir., 1966, 372 F.2d 836, affirmed en banc, 1967, 380 F.2d 385, 394; Singleton v. Jackson Municipal Separate School Dist., 5 Cir., 1969, 419 F.2d 1211, 1217 1218 (Singleton III) (en banc); McLaurin v. Columbia Municipal Separate School Dist., 5 Cir., 1973, 478 F.2d 348, en banc court dissolved, 486 F.2d 1049; Adams v. Rankin County School Board, 5 Cir., 1973, 485 F.2d 324; Lee v. Macon County Board of Educ., 5 Cir., 1971, 453 F.2d 1104.

3. Local 189, United Papermakers and Paperworkers v. United States, 5 Cir., 1969, 416 F.2d 980, 988, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; United States v. Jacksonville Terminal Co., 5 Cir., 1971, 451 F.2d 418, cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); United States v. Hayes International Corporation, 5 Cir., 1972, 456 F.2d 112; Bing v. Roadway Express, Inc., 5 Cir., 1973, 485 F.2d 441 and 444 F.2d 687.

4. Local 53 Asbestos Workers v. Vogler, 5 Cir., 1969, 407 F.2d 1047.

fair cross section of the community the state must consciously take into account identifiable groups such as blacks.[5]

Use of race consciousness as a part of the judicial remedy to overcome or alleviate past discrimination is neither new to the Fifth Circuit nor in need of outside assistance from our sister Circuits, much as we welcome it.

CLARK, Circuit Judge (concurring):

Insofar as our mandate permits the district court in its discretion to require the use of quotas or other forms of race-conscious hiring relief here, we break judicial new ground in this circuit. Not only the novelty but also the sweep of today's precedent—applying as it does to all appointed officials—persuades me to record this concurrence.

Unfortunately, no court has ever adequately rationalized the constitutional infirmities suggested in Judge Gee's dissent that are inherent in requiring "affirmative hiring practices" based upon race. When the first Mr. Justice Harlan dissented in Plessy v. Ferguson, 163 U.S. 537, 554–555, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896), he put this side of my problem more aptly than I can.

> In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But

5. Brooks v. Beto, 5 Cir., 1966, 366 F.2d 1, cert. denied, 386 U.S. 975, 87 S.Ct. 1169, 18 L.Ed.2d 135, reh. den., 386 U.S. 1043, 87 S.Ct. 1489, 18 L.Ed.2d 618; Rabinowitz v. United States, 5 Cir., 1966, 366 F.2d 34; Labat v. Bennett, 5 Cir., 1966, 365 F.2d 698, cert. den., 386 U.S. 991, 87 S.Ct. 1303, 18 L.Ed.2d 334; Mack v. Walker, 5 Cir., 1966, 372 F.2d 170, cert. den., 393 U.S. 1030, 89 S.Ct. 641, 21 L.Ed.2d 573; James v. United States, 5 Cir., 1969, 416 F.2d 467, cert. den., 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87.

> I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.

It is logically inconsistent to propound in one breath the ideal abstraction that "[o]ur Constitution is color-blind, and neither knows or tolerates classes among citizens . . . [who] are equal before the law," Plessy v. Ferguson, *supra*, 163 U.S. at 559, and in the next to assert that the same document allows an appellate tribunal to mandate the utilization of overt classification by race as a remedy for past wrongs. Yet I recognize that in the context of integrating public educational institutions this court has stated:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

United States v. Jefferson County Board of Education, 372 F.2d 836, 876 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (1967), cert. denied, Caddo Parish School Bd. v. United States, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967). In the same context, the Supreme Court has clearly affirmed the use of "mathematical ratios" by a federal chancellor as a "useful starting point in shaping a remedy to correct past constitutional violations." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

Despite congressional proscriptions against preferential treatment or utilization of race as a factor in the decision not to hire, 42 U.S.C. § 2000e–2(a), (j); *see also* Griggs v. Duke Power Company, 401 U.S. 424, 431–432, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), other circuits have not hesitated either to affirm, approve or institute orders requiring affirmative hir-

ing relief when deemed necessary to eradicate the present effects of past discrimination in suits brought under Title VII of the Civil Rights Act of 1964. *See, e. g.*, United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Local Union IBEW Local Number 212, 472 F.2d 634 (6th Cir. 1973); United States v. Wood Lathers Local No. 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); United States v. Carpenters Local No. 169, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972); United States v. Ironworkers Local No. 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); United States v. IBEW Local No. 38, 428 F.2d 144 (6th Cir.), cert denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970). We have too. Local No. 53 Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

The Philadelphia Plan and other similar programs, which pursuant to Executive Order require minority representation in federally-assisted construction projects, have been specifically approved. *See, e. g.*, Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Association v. Shultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); Joyce v. McCrane, 320 F.Supp. 1284 (D.N.J., 1970); *see also* Associated General Contractors v. Altshuler, 490 F.2d 9 (1st Cir., 1973).

Four of our sister circuits have approved requiring the use of affirmative hiring relief by public agencies that have engaged in employment practices which have been shown to have a racially discriminatory effect. *See, e. g.*, Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *but see* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

Despite my doubts that its constitutional validity can be reasonably articulated, this overwhelming precedent constrains me to concur in holding that the imposition of quota hiring relief is a permissible exercise of the federal chancellor's discretion.

The statistics which Judge Coleman has developed as to other similar agencies cogently demonstrate that Mississippi is not unique, but they also reinforce my belief that, given the legal power to impose it, this powerful discretion should be vested in the trial court here. This is especially true in light of the fact that the Mississippi Highway Patrol urges on oral argument that it is already engaging in the practice of hiring every qualified black applicant.

I do not understand the majority opinion to require the dilution of any valid employment qualification as an adjunct of achieving the integration it requires and would not concur if it did, for such a proviso or consequence would be contrary to common sense and every prior precedent. Surely, too, it is implicit in what we say that if any affirmative relief provision imposed should prove unworkable, the defendant officials would petition for and be entitled to supplemental relief. Therefore, I find no refuge in Judge Roney's suggestion of preferential black hiring, which is obviously encompassed in the majority's "affirmative hiring relief" anyway.

With deference to Chief Judge Brown and Judge Wisdom, I had not the slightest intention of underbilling the pioneer spirit which has marked this circuit's broad range of integration ratio and other race-based relief orders. However, today our national concepts of a proper solution to the chronic problem of race relations are in a state of flux. At a time when conservative resistance to mandates for social change has begun to melt, the liberal elite openly voice doubts that past remedies are efficacious and suggest that egalite be pursued in forms that differ from "separate but equal" in name only. In such a situation I deem it important to record that (1) no holding by this or any other court has yet spelled

out how quota relief can be squared with constitutional fundamentals, (2) employment quotas have never been ordered by this circuit, and (3) if precedent did not compel concurrence, I would opt for a different course.

RONEY, Circuit Judge, with whom BELL and AINSWORTH, Circuit Judges, join (concurring specially):

I concur in the result and in most of the text of the above opinion. I do not concur, however, in that portion of the opinion which indicates approval of a temporary hiring quota.

Although the opinion rejects the idea that a hiring quota would dilute valid employment qualifications, that result seems inevitable to me in the context of this case. The record does not indicate the availability of blacks meeting present qualifications. The State reported at oral argument that since the decree the Patrol has hired every black applicant found qualified under present standards. We do not yet know the potential availability of blacks meeting the minimal employment qualifications that will eventually be approved by the District Court. Until qualified blacks become available for employment, a hiring quota will either require employment of underqualified or nonqualified blacks or effect a freeze on hiring. Yet the majority disclaims any suggestion of hiring unqualified people. Moreover, an effective freeze on hiring could subvert the Patrol's primary purpose of protecting the public.

A temporary requirement that the Patrol hire every black applicant who meets the minimal qualifications which the Court may finally determine to be valid would not invite such an adverse result. Relief of that nature might be in order until a sufficient number of blacks have been hired to overcome the effects of the past discriminatory employment practices on the Patrol. Hiring goals, hiring timetables, and the provision of additional training are all worthy of consideration by the District Court, but a fixed quota, temporary or permanent, could well prove counter-productive.

COLEMAN, Circuit Judge (dissenting):

I agree that no *properly qualified person* should be denied appointment to the Mississippi Highway Safety Patrol on account of race, color, religion, national origin, or any other factor contrary to the basic principles protected by the Fourteenth Amendment. That is not my difficulty with this appeal. It appears clear to me that the majority opinion incorrectly travels beyond Constitutional requirements in several respects; therefore, I must respectfully dissent to much of the language appearing therein. I have particular reference to the open hints that minimum requirements for eligibility may be reduced, that the requirement of a high school diploma or its equivalent may be dispensed with, and that the State may not really satisfy itself of the intelligence of those who are to be trusted with such crucial responsibility. Finally, I do not wish to be understood as agreeing to "quota hiring", temporary or otherwise.

With deference, the fundamental error of the majority opinion is in its approach to intelligence and educational qualifications for Mississippi state highway patrolmen as if they were mere "jobholders" or "employees", performing routine activities, when the truth is that they are state *officials*, charged with the execution of duties vital to the enforcement of the law and the preservation of human life on the highways, demanding the daily exercise of sound discretion.

By an Act approved April 1, 1938, Chapter 143, Laws of Mississippi of 1938, the Mississippi Legislature created a highway safety patrol, to be composed of not more than 53 men (now expanded to 425), to be elected after an examination as to *physical* and *mental fitness*, knowledge of traffic laws, the law of *arrest*, and acquaintance with the rules and regulations of the State Highway Commission, the Public Service Commission, and the Motor Vehicle Commissioner (emphasis added). Each patrolman was required to furnish bond in the sum of $5,000 for the faithful performance "of the duties of his *office*" (emphasis added). After twelve months' service, no

patrolman may be dismissed except upon written order of the governor, after a hearing on charges filed not less than ten days in advance.

These factors made these men officials, not employees or jobholders, State v. McLaurin, 159 Miss. 188, 131 So. 89 (1930); Golding v. Armstrong, 231 Miss. 889, 97 So.2d 379 (1957).

Certain classes of patrolmen are vested with general peace officer jurisdiction throughout the State, as in the case of the Texas Rangers. By the duly published proclamation of the governor, all patrolmen may be assigned general peace officer jurisdiction in order to suppress mob violence, crimes of violence, riots, and acts of intimidation or terror. All patrolmen are armed with .357 magnum pistols and other highly effective weapons. Moreover, in their enforcement of the highway safety laws they encounter every year hundreds of deaths and thousands of personal injuries on the highways.

Patrolmen are generally on duty for twelve hours a day, for specified days of the week, and may be transferred at the discretion of the Commissioner to any point in the State where it is believed that their services may best be utilized. These officers deal constantly and continuously with interstate and intra-state travellers, law abiding or otherwise. They are subjected to all the hazards of any uniformed police officer and, regretfully, some in the line of duty have lost their lives since 1938. An unintelligent, untrained officer, possessed of less than average judgment and ability, armed as he has to be, may be a hazard to the travelling public. I believe that these officers perform functions which are of compelling state interest.

I cannot agree that the Fourteenth Amendment was ever intended to mean, nor that it requires, that citizenry and visitors, travelling under the protective cloak provided by the Constitution of the United States, must be subjected to arrest, imprisonment, and even more deadly dangers at the hands of incompetent officers of whatever race.

Every state in the Fifth Circuit requires that its highway patrolmen shall have a high school education or its equivalent, except Texas, which requires 45 semester hours of college

It is too late to weep when some under-educated, subnormally intelligent individual, white or black, armed with deadly weapons, unjustifiably launches a human being into eternity or severely wounds him or impermissibly deprives him of his liberty simply because that officer was thrust into a position for which he lacked the education, the intelligence, and the sound judgment to deal with problems which highway patrolmen have to encounter every day. Moreover, it is too late to weep for the officer's wife and children when he is brought home a corpse, the victim of a criminal who had the mental advantage of him from the start. So, as a court of equity, as we are in this case, we should be extremely wary of the exercise of our own discretion to downgrade the quality of enforcement and protection which the people are entitled to expect on the highways.

That is not all. I believe that under the binding precepts of federal-state relations, the state has the right to prescribe the qualifications and duties of those state officials who are charged with the performance of purely state functions, certainly so, as long as those qualifications are neither arbitrary, nor unreasonable, nor capricious, nor racially discriminatory.

I refer to the language of the Supreme Court in Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970):

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception

of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty'." [Emphasis added and footnotes omitted]. 90 S.Ct. at 525.

If this may be said of those who are to perform the comparatively safe functions of a juror, and under the directions of a presiding judge, then how much more true should it be of those who are to spend their days in the highly transitory conditions of the highways, apprehending criminals, succoring the injured, handling fatalities, and trying to improve driving practices.

The test is whether the qualifications are "capable of being carried out with no racial discrimination whatsoever". Id., at 526.

There is nothing in this record to suggest that Mississippi is so bereft of Negro high school graduates and college trained persons that it has no adequate pool of qualified individuals for highway patrol service. I think common knowledge shouts loudly to the contrary. Of course, one cannot be drafted into the patrol, as he can be for military service, and there are many who are reluctant to undertake this dangerous work. There are many who do not like twelve hour days or transfers to strange territory. That, in a free society, is their privilege. It should not, however, be converted into an engine for the employment of individuals, of any race, who, unfortunately, are of inadequate intelligence or handicapped by lack of a reasonable education. Indeed, it smacks of judicially asserted notions of racial inferiority to suggest that standards of intelligence and education have to be relaxed if the Negro applicant is to be able to meet the requirements. I am sure the majority had no such thought in mind.

The majority opinion states that the District Court "may, within the bounds of discretion, order *temporary* one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on

white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated".

If "temporary" quotas are permissible, I fail to see why a "permanent" quota would be impermissible. Relying on Harper v. Kloster, 4 Cir., 1973, 386 F.2d 1134, and especially in view of our dealing with state officials rather than mere employees performing routine tasks, I would make it clear to the District Court that hiring quotas and "white freezes" are not appropriate tools in the resolution of this problem. I agree with what the District Court said in Harper v. Mayor and City Council of Baltimore, 359 F.Supp. 1187, 1213–1215, affirmed in Harper v. Kloster, supra, that the Supreme Court has not dealt with the granting of favors or the *creation* of rights on a racial basis as part of a court's remedial powers, that, without regard to race, all prospective employees and all prospective state officials have the right to consideration for selection and that the courts should not re-enforce the view that it is the *race* of applicants which is important rather than their qualifications. In other words, the public is not required to sacrifice the qualifications of those who serve it and the qualified are not to be denied appointment or employment because of their race.

If I had the right to decide this case on my own, I would remand it to the District Court with the following directions:

1. The right of the State to prescribe the qualifications of those who are to perform highway patrol functions shall be undisturbed;

2. The District Court will supervise the compilation of a *racially neutral* intelligence test from which the State can, and will be required to, fairly and impartially determine the intelligence of its prospective officers;

3. The Mississippi Highway Safety Patrol will be required semi-annually to visit every high school graduating class and every college campus in the State for the purpose of announcing that it is seeking to recruit highway patrolmen, without

regard to race or color, from among those qualified to undertake the work, explaining the qualifications in a thoroughly understandable manner. Similar announcements should be made in the press, on the radio, and by television;

4. No qualified black applicant may be passed over for an appointment in the Mississippi Highway Safety Patrol except for an applicant who clearly and objectively possesses higher qualifications for that particular appointment;

5. Appropriate quarterly reports shall be required to insure that no duly qualified black person has been denied an appointment on account of race.

This approach should banish race as a factor in the appointment of highway patrolmen, without sacrificing the competency of the organization.

It is noted from the figures in this record that in 1972, forty-seven white applicants and one black applicant were rejected for failure to pass the physical examination, while sixty-six white applicants and fifty-four black applicants failed the prescribed intelligence test, the racially neutral character of which has not been established. In any event, there is plenty of room to say that in the search for high quality patrol officers, both whites and blacks have been rejected in substantial numbers. It only remains for the highway patrol, in the pursuit of competence, to immunize itself in an indisputable manner from all appearances of racial discrimination. Certainly, in the proper application of racially neutral intelligence tests, plus the requirement of a high school education or its equivalent, that goal can be achieved.

I close by pointing out that we are not here dealing with a problem peculiar to Mississippi. Depressing the competency of the Mississippi Highway Patrol will prove to be a bad precedent for the other states of this Circuit. According to the best records publicly available, on February 11, 1974 the

racial composition of the highway patrols in these six states was as follows:

State	White	Black
Alabama	335	13
Florida	1088	12
Georgia	677	7
Louisiana	689	11
Mississippi	543	5
Texas	356	16

If the education and the intelligence of the Mississippi Highway Patrol are to be diminished by judicial decree, no prophet is required to name the next on the schedule for similar treatment.

I would remand the case for a more meaningful effort to recruit qualified patrolmen of the Negro race, but not by the methods hinted by the majority opinion. As to those features of the opinion, I respectfully dissent.

GEE, Circuit Judge (concurring in part and dissenting in part):

Agreeing as I do with almost the entire text of the majority opinion, and troubled moreover by a progress toward racial parity in hiring practices of such glacial slowness as to suggest the possibility of recalcitrance, I am yet unable to concur in the opinion's approval of racial hiring quotas or a freeze on white hiring as remedies appropriate for application by the district court. That they would be effective is plain. That they are constitutional, to me, less so.

As to these remedies, it is a strangely familiar message which the Court finds the Fourteenth Amendment has today for the qualified white applicant who is rejected solely because of his race. Indeed, it is the same message which the Constitution had only yesterday for the qualified but segregated Negro schoolchild: all people are equal, but some are more equal than others.

Today, integration is seen as an overriding end, yesterday segregation. The Constitution should be above the day's fashion in moral imperatives. We here advance some distance along what seems to me a wrong turning, but it may be that another cross-roads is at hand. See DeFunis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169 (1973), cert. g'td, — U.S. —, 94 S.Ct. 538, 38 L.Ed.2d 329 (1973).[1]

1. In which is raised as well the question whether the rule of a state law school requiring white students, solely on the basis of race, to meet higher admission standards than others violates 42 U.S.C. § 2000d, which forbids discrimination on racial grounds in federally assisted activities.

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 4716

WILLIE L. MORROW and JEROME MANGUM
Individually and on Behalf of All
Others Similarly Situated
PLAINTIFFS

VS.

GILES W. CRISLER, COMMISSIONER OF PUBLIC SAFETY OF MISSISSIPPI; JAMES D. GARDNER, CHIEF OF THE MISSISSIPPI HIGHWAY SAFETY PATROL; JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI; and CHARLIE SNODGRASS, PERSONNEL OFFICER OF THE MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY
DEFENDANTS

(Filed September 29, 1971)

This suit in equity was filed by the plaintiffs, Willie L. Morrow and Jerome Mangum, Black citizens of the United States and the State of Mississippi, on behalf of themselves and the class that they purport to represent, alleging racially discriminatory employment practices by the named defendants, the Governor of the State of Mississippi and officials of the Mississippi Department of Public Safety and the Mississippi Highway Safety Patrol. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343, and 28 U.S.C. §§ 2201 and 2202, with the right of action based upon the Fifth and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of

1964, 42 U.S.C. §§ 1981-1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d);[1] more specifically, injunctive relief is asked under 42 U.S.C. §§ 1981-1983 and 42 U.S.C. § 2000(d), et seq. and declaratory relief is sought under 28 U.S.C. §§ 2201-2202.

The class which plaintiffs allege to represent are all qualified Negroes who have applied or who will in the future apply for employment with the Mississippi Department of Public Safety and/or the Mississippi Highway Safety Patrol, all qualified Negroes who have been deterred from applying for employment with the Department and Patrol because of its racial composition and reputed discriminatory hiring policies, all present Negro employees of the Department and Patrol, and all future Negro employees of the Department and Patrol.

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1. 42 U.S.C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 601, Title VI, Civil Rights Act of 1964, provides:

"Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

On August 26, 1970, the defendants filed a Motion to Dismiss and at the hearing thereon also sought Summary Judgment by presenting, with the permission of the Court, matters outside the pleadings. In a Memorandum Opinion dated and filed herein on February 12, 1971, this Court overruled the defendants' Motion, finding that it had jurisdiction of the parties and of the subject matter; that the Complaint met the requirements of Rule 23, F.R.C.P. for the maintenance of a class action; that the defendants herein, as officers of the State of Mississippi are not immune from this action; and that the defendants had failed to show that they were entitled to have the action dismissed in that there were genuine issues as to material facts and thus they were not entitled to a Summary Judgment. This Court's above Findings and Conclusions were incorporated in its Order of February 15, 1971 filed herein.

On May 24, 1971, the United States of America moved to appear as amicus curiae inasmuch as the plaintiffs allege that (1) they are denied the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution[2], and (2) that the United States has granted substantial funds to agencies administered by the defendants pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, 82 Stat. 197).[3] Law enforcement agencies receiving such funds are prohibited from discriminating in employment practices because of race, color or national origin by virtue of regulations adopted by the Attorney General of the United States under the foregoing statute on November 25, 1970 (28 C.F.R. 42.201, et seq.). This Court was thus of the

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2. See *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 782 (1967); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

3. See Exhibits P-13 and P-23.

opinion and found that the United States may properly advise the Court of its views as to whether the defendants are administering their agencies which receive federal financial assistance in a discriminatory manner, and, if discrimination is found, then should suggest methods for ending it. After the defendants filed their Answer herein on February 19, 1971, in which they admitted the race and residence of the plaintiffs and the official capacities and responsibilities of the defendants, but denied the other material, factual and legal allegations of the Complaint, the plaintiffs, on May 24, 1971, filed a Motion for a Preliminary Injunction in which they asked the Court to enjoin the defendants from training or hiring White citizens as patrolmen without first offering training and employment to all qualified Blacks who had applied or sought to apply for positions with the Mississippi Highway Safety Patrol since January, 1970, particularly in view of the fact that after this suit had been filed and process had been served on the defendants, the plaintiffs, learned through the defendants' Answers to Interrogatories propounded to them that the defendants without notice to the Court or the plaintiffs convened an all-White recruit class and conducted recruit training for sworn officers of the Mississippi Highway Safety Patrol from September 20, to December 11, 1970. This class consisted of 22 White recruit patrolmen, three of whom had filed applications for patrolmen positions bearing dates subsequent to the refusal of the named plaintiffs' request for application forms, which gave rise to this suit.

The plaintiffs, on behalf of themselves and the class which they represent, allege that the defendants have discriminated against them and members of the class by: (a) failing and refusing to permit them to apply for staff positions with the Department of Public Safety solely be-

cause of race or color; (b) failing and refusing to hire and train them for staff positions in the Department of Public Safety solely because of their race or color; (c) maintaining certain departments, divisions, and bureaus within the Department of Public Safety for Whites only; (d) maintaining certain jobs and job categories within the Department of Public Safety for White only and others for Negroes only; (e) failing and refusing to promote Negroes to positions of higher responsibility and benefits or to supervisory positions solely because of their race or color; (f) failing and refusing to prohibit the use of racial terms and epithets which are humiliating and derogatory and insulting to members of the Negro race by staff persons and officers; (g) otherwise applying terms and conditions of employment within the Department of Public Safety in a racially discriminatory manner (Par. 18 of Complaint).

The plaintiffs and members of their class seek declaratory relief to the effect that they have a right secured by the Constitution and laws of the United States to be free from the policy and practice of the defendants of allegedly denying and interfering with their rights to enjoy equal employment opportunities in hiring and conditions and terms of employment without discrimination on the basis of race or color. Additionally, they seek a preliminary and permanent injunction enjoining the defendants from continuing the above alleged discriminatory employment practices; requiring the defendants to offer to plaintiffs the positions and training for which they applied and all other privileges, responsibilities and emoluments which they would have received but for the alleged discrimination; requiring the defendants to institute appropriate affirmative action to overcome the effects of alleged discrimination in the past by means of a recruiting program designed

to increase the number of Negro officers on the Highway Patrol to the end that their percentage of membership thereon would not significantly differ from the percentage of Negroes in the population of Mississippi; and asking that the defendants be required to make plaintiffs whole for the loss of income they have suffered as a result of the alleged discriminatory hiring practices and for payment of their costs and a reasonable attorney's fee (Para. 22 of Complaint).

In their Motion for a Preliminary Injunction, plaintiffs alleged that there was an imminent substantial likelihood that prior to the final determination of this case the defendants would fill all available patrolmen vacancies with White persons, thus preventing them and their class from obtaining the requested relief to their irreparable damage and injury. After a hearing on May 28, 1971, this Court denied this Motion on the grounds that (1) the defendant Commissioner of Public Safety, Giles W. Crisler, had filed an affidavit herein assuring the Court that no date for any subsequent recruit training class had been set and that he would notify the Court if he decided to conduct a training class prior to the final decision on the merits of this action; (2) the defendants agreed to provide application forms to the named Black applicants and all other Black applicants who had previously been denied those forms; (3) the trial of this case on its merits was imminent and there would be a decision herein within the immediate future; and (4) that a pre-trial conference had been held herein on June 7, 1971, at which the parties reported to the Court substantial progress toward reaching an agreement concerning various aspects hereof. Thus, this Court in its Memorandum Opinion of June 10, 1971 was of the opinion and found that there was no threat or danger of irreparable injury and damage and accordingly denied a preliminary injunction.

This case was tried on its merits on June 28, and June 29, 1971 at which eight witnesses testified and many exhibits were admitted in evidence. Based on all of the evidence before the Court, the Proposed Findings of Fact and Conclusions of Law submitted by the parties as well as Memoranda Briefs and various other recommendations, proposals, reports, objections and suggested changes being filed by the parties herein subsequent to the trial, this Court makes the following Findings of Fact and reaches the following Conclusions of Law pursuant to Rule 52(a), F.R.C.P.

FINDINGS OF FACT

1.

The plaintiffs, Willie L. Morrow and Jerome Mangum, are adult male Negro citizens of the United States and residents of Rankin County, Mississippi.

2.

Plaintiffs bring this action on behalf of themselves and all other persons similarly situated, the class having been fully denominated above, which class is alleged to be so numerous that joinder of all parties is impracticable, that there are questions of law and fact common to the class, the claims of plaintiffs are typical of the claims of the class, plaintiffs will fairly and adequately protect and represent the interests of the class, and it is alleged that defendants have acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief with respect to the class as a whole.

3.

The Mississippi Department of Public Safety (Department) is a state agency organized and existing under the

laws of the State of Mississippi and Executive Orders of the Governor of the State. The Mississippi Highway Safety Patrol (Patrol) also is a state agency within the Department of Public Safety organized and existing under the laws of the State of Mississippi and Executive Orders of the Governor. At all relevant times herein, the defendants were acting under color of the laws of the State of Mississippi and/or orders based thereon.

4.

The defendant, John Bell Williams, is and has been since January, 1968, Governor of the State of Mississippi and Chief Executive Officer thereof and as such is the Chief Executive Officer of the Mississippi Department of Public Safety and the Mississippi Highway Safety Patrol, being the highest authority with the ultimate say-so therein. He is a resident of Jackson, Hinds County, Mississippi.

5.

The defendant, Giles W. Crisler, is and has been since January 1968, the Commissioner of Public Safety of the State of Mississippi and is in charge of the Department of Public Safety and the Mississippi Highway Safety Patrol although he works under the supervision of, is subject to the orders of, and is responsible to the Governor. He is in command of the overall administration and operation of the Department and of the Patrol, and in this capacity, he is responsible for finally approving and otherwise passing on all applications for positions with the Department and Patrol. His offce is in Jackson, Mississippi, and he resides in Clinton, Mississippi.

6.

The defendant, James D. Gardner, is Chief of the Patrol and is in charge of its operations. He is subservient

to, works under the supervision of, and is answerable to Commissioner Crisler. His office is in Jackson, Mississippi.

7.

The defendant, Charlie Snodgrass, is Personnel Officer of the Department and in this capacity is responsible for administering personnel policies and procedures of the Department, including the hiring of personnel. He is also the administrative assistant to Commissioner Crisler, Chief of the Bureau of Narcotics and Dangerous Drugs, Chief of the Driver Control Department, and Chief of the Data Processing Department. His office is in Jackson, Mississippi.

8.

Since June, 1969, the Depatment and the Patrol have been the recipients of federal financial assistance in excess of $30,000 for training and other purposes pursuant to the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197.

9.

Plaintiff, Willie Lee Morrow, a married Black male resident of the State of Mississippi and the father of one child served in the United States Air Force as an Air Policeman and also in a supervisory capacity within the Air Police after being extensively trained in and having performed police work. On May 29, 1970, he telephoned the Personnel Department of the Patrol at its headquarters in Jackson, Mississippi to ask if he could procure an application form to apply for the position of patrolman and was told by "a lady" to come in on Monday, June 1, 1970 and report to the Personnel Department to pick up the form from Charlie Snodgrass, Personnel Officer, which he did. However, when Morrow arrived, Snodgrass was not in and he was told by the Secretary to return on June 4 which

he did, but he was refused an application form by Snodgrass who told him that none was being given or received and that there would be no further hiring of patrolmen at that time because of budgetary reasons, i.e., the bi-annual legislative appropriation of funds for the Highway Patrol had been expended. At this time the Patrol was on a bi-annual budget because the Mississippi Legislature at that time met every two years although in 1970 it began meeting annually and the Patrol has been budgeted annually since the beginning of the July 1, 1970 fiscal year. Snodgrass told Morrow to return in September when he thought funds would be available to begin another recruit class which must consist of approximately 25 trainees, and although Morrow was advised by his attorney of record, Mr. Frank Parker, to return in September he failed and refused to do so, and did not return until June 1, 1971 in order to obtain an application form which he was told would not be given until July 1, 1971. In the interim, however, pursuant to the request of this Court at the hearing on the Motion for Preliminary Injunction filed by the plaintiffs, the defendants did furnish both of the named plaintiffs herein as well as the witness Owen Glen Coker, a Black applicant who was also refused an application in January and April, 1971, with application forms which have now been completed and are being processed by the Patrol. The defendant Morrow did in the interim, on June 12, 1970, return to the Patrol headquarters with the plaintiff Mangum who had accompanied Morrow on June 4, 1970 on his headquarters visit, and Mangum requested an application which was refused by Snodgrass for the same reason given Morrow. Mangum was told by Snodgrass to return in August or September, 1970 at which time he would probably be given an application form because of the proposed lifting of the "employment embargo" or "freeze", but he also failed and refused to return despite the con-

trary advice of his attorney, Frank Parker. Mangum did not return or attempt to obtain an application form for the Patrol until he accompanied Morrow on June 1, 1971 and was told to return in July, 1971; however, he attained a form in the same manner as Morrow and Coker on June 10, 1971.

10.

In addition to the "employment embargo" which applied to all positions, including those of clerks and secretaries in all departments of the Department beginning in February or March of 1970 and remaining in effect until June for non-patrolmen and July, 1970 for patrolmen, defendants further gave as bases for their refusal to give applications to the named plaintiffs that Morrow and Mangum did not meet the statutory requirements prerequisite to employment as uniformed or sworn officers of the Patrol, namely, that Morrow on the date that he sought the application form weighed 160 pounds instead of the minimum prescribed weight of 165 pounds[4] and that Mangum was not 21 years of age at the time that he sought this application form.[5] These lattter contentions were rejected by this Court in its Memorandum Opinion overruling defendants' Motion to Dismiss and for Summary Judgment and was apparently then abandoned and not urged again during the trial of this case. The Court finds that both of these named plaintiffs, as well as Owen Glen Coker, met all objective prerequisites and requirements to permit them to apply for membership on the Patrol, inasmuch as the 21-year age requirement applies to the time of hiring of an applicant as a patrolman subsequent to receipt of his application and his completing recruit training

4. Sec. 8086, Miss. Code of 1942, Rec.

5. Sec. 8079, Miss. Code of 1942, Rec.

school, and the minimum weight requirement has been uniformly applied by the Patrol to the time of the actual acceptance of an applicant into recruit training school rather than at the time that he applied, and based on Exhibit P-11 (107 applications of patrolmen who were hired subsequent to June 1, 1968) this minimum weight requirement as well as the minimum height requirement of 5'9" was apparently not uniformly applied by the Patrol.

11.

This Court does find however that in approximately March, 1970, because of budgetary reasons, that is, the lack of funds which resulted in part from the complete loss and necessary replacement of equipment and facilities by the Highway Patrol on the Gulf Coast as well as the employment of practically the entire Patrol with the resultant expense of room and board on the Coast because of and following Hurricane Camille which struck on August 17, 1969, resulting not only in the above physical losses but in great expenditures of money on the part by the Patrol in excess of that anticipated by it and the legislature, that an "employment embargo or freeze" was in fact imposed on the hiring of all personnel within the Department of Public Safety until July, 1970 for sworn officers and June 1970 for clerical, secretarial and all other employees. Commissioner Crisler issued his order to Mr. Snodgrass, the Patrol Director of Personnel, discontinuing the acceptance of applications and employment of any personnel by the Department during the above period. Although he did not specifically instruct Snodgrass not to give out any application forms, which were also available at the various Patrol districts throughout the state, where the inspectors in charge were authorized to distribute them on request, nevertheless Snodgrass implemented the Commissioner's orders and instructions by the additional action which he

took in refusing to give application forms to those applying during the "freeze" period and instructing the inspectors in the various districts throughout the State to likewise refrain from doing so.

12.

The evidence shows that six applications of Whites were accepted in the August-September 1970 recruiting class and hired as patrolmen were dated subsequent to March 1970, namely:

Tommy Gayle Walters	April 23, 1970
Larry Wayne Muse	May 4, 1970
James Clyde Wall	May 7, 1970
Richard Breeland Peden	June 15, 1970
Dennis Wayne Abel	September 17, 1970
Joseph Samuel Gonce	September 17, 1970[6]

However, the evidence does not show that any of these forms was given to any of the applicants during the employment freeze period or, with the exception of that of Richard Breeland Peden, were filed with or accepted by the Patrol during that period. It is the undisputed testimony of Snodgrass that the dates on the applications do not evidence the dates on which they were filed, and that the Patrol did not utilize a stamp showing the date on which any application was received; furthermore, there was no record thereof except for the application of Richard Breeland Peden which Snodgrass admitted receiving on June 15, 1970, placing the date thereon at the request of and as a special favor for a patrolman who was the brother-in-law of Peden, and putting this application in his desk

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6. The application forms of these six persons are contained in Exhibit P-11. See also Exhibit P-15 (Answer 11 of Defendants' Answers to Plaintiffs' Second Interrogatories).

drawer from which it was not removed nor processed until August, 1970 when applications were distributed, received and processed for the September, 1970 recruit class of 22 all-White patrolmen who were subsequently hired. In addition, there were many more applications filed by unsuccessful applicants in August and September, 1970 for enrollment in this class, and it was standard operational procedure for the Patrol to destroy the applications of all those who were not accepted. The Court finds that Snodgrass' action in accepting the application of Peden was not racially discriminatory or done for the purpose of discriminating against Blacks, or showing preference to Whites, but this was the only exception made by Snodgrass and was done as a favor for a patrolman who was Peden's brother-in-law. Although this action evidenced partiality against all other applicants, Black and White, Peden's application was not processed until August, 1970 when other applications were processed. Additionally, the fact that Abel and Gonce filed their applications on or subsequent to September 17, 1970 and were accepted as recruit trainees for the class of September, 1970 and subsequently hired, evidences the fact that if Morrow and Mangum had returned in August or early September as requested by Snodgrass they could have obtained application forms and filed them in sufficient time to be considered for acceptance in the September, 1970 training class. They did not do so despite the advice of their counsel herein. Their application forms which have now been completed, together with that of Coker, have now been accepted and are being considered and processed by the Patrol.

13.

Other than the two named plaintiffs and Coker, the plaintiffs offered no evidence of any other Black applicants being refused an application form to apply for a position

with the Patrol. Snodgrass' testimony that he had previously given application forms to Black applicants prior to the employment freeze period is undisputed as is his testimony that applications had been received from Blacks but that none had ever been accepted as trainees or hired as patrolmen since he joined the Patrol in 1946.

14.

According to the 1960 United States Census, the population of the State of Mississippi was 42% Black, and according to the 1970 Census the population of the State is 36.7% Black. The Mississippi Highway Patrol has never in its history employed a member of the Negro race as a sworn officer (patrolman).

15.

As of April 15, 1971, of the 27 bureaus within the Department of Public Safety, only two, the Maintenance Bureau and the Training Academy, had any Black employees and these consisted of cooks at the Training Academy and janitors in the Maintenance Bureau. The employees of all the other bureaus within the Department, including clerical and secretarial personnel and sworn officers were White. Of the Department's 743 employees, 17 are Black and this has been the case since 1968.[7] The Mississippi Highway Patrol has never in its history employed a Black as a sworn officer.[8] Since January 1, 1968, 197 persons, all White, have been hired as Mississippi Highway Patrolmen.[9]

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7. Exhibit P-8 (Pre-Trial Order), Para. 7(8); Exhibit P-13 (Answers 5 and 6 of Defendants' Answers to Plaintiffs' First Interrogatories).

8. Exhibit P-8 (Pre-Trial Order), Para. 7(7).

9. Exhibit P-10 (Stipulation "B"). The application forms of these 107 patrolmen are in evidence as Exhibit P-11.

16.

Although the defendants denied the charge that they maintained any racially discriminatory hiring or employment policies, no explanation was given by them for the all-White racial composition of the sworn officers of the Patrol.

17.

Qualifications for patrolmen are provided for in Mississippi's statutes found in the Mississippi Code of 1942, Rec.[10] Qualifications for clerical and certain technical jobs within the Department of Public Safety have, since March, 1971, been established by the Mississippi Classification Commission.[11] Section 8086 of the Mississippi Code which governs qualifications for entry into the State's training school for patrolmen provides, inter alia, that an applicant must fill out an application, take a standardized test for policemen, be in good physical condition, including a height of at least 5'9" and weigh not less than 165 pounds, be of good moral character, be a resident of the State for at least five years (absence in National Service or attending school not to disqualify) and have completed a high school education. Section 8079 of the Mississippi Code governing entry into the service as a patrolman provides, inter alia, that at the time of an appointment, a person must be a citizen of Mississippi and the United States, of good moral character and be not less than 21 years of age.

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10. See Sections 8079, et seq. and 8086, et seq., Mississippi Code of 1942, 1970 Cuml. Supp. Also see Exhibit P-13 (Answer 21 of Defendants' Answers to Plaintiffs' First Interrogatories).

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11. See Exhibits P-13 and P-7 (Deposition of Charles E. Snodgrass, pp. 73-74, 77-87).

18.

Members of the Patrol have been permitted to apply for patrol training even though they did not meet the statutory weight and height requirements at the time of their application[12] and although they were not 21 years of age as of that date.[13]

19.

Two tests are required of applicants for positions of sworn officers with the Patrol, the Otis Quick Scoring Mental Ability Test and an oral spelling test of which no record is kept.[14] Both of these tests are administered and graded by Snodgrass, and neither has been validated to determine whether there is a significant correlation between high scores on the test and good performance as a patrolman.[15]

20.

The training schools are convened by and operated under the authority of the Commissioner of Public Safety

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12. See Exhibit P-11 which contains the applications for employment of 107 Whites hired as patrolmen since January 1, 1968 to which are attached physical examination forms, and particularly the following applications: Buford Randolph Sibley whose weight is listed on the application as 160 and on the physical examination form as 161; Billy Dean Arnold whose weight is listed as 153 pounds; Ira Richard Allen whose weight is listed as 158 pounds; David Clinton Flake whose height is listed as 5'7-1/2" and weight as 160 pounds (no physical examination form is attached thereto); Robert Louis Aubuchon whose weight is listed as 156 pounds but whose physical examination form lists his weight as 148 pounds and height as 5'8-1/2".

13. For example, see the applications for employment of Wiley Roy Wooten dated September 22, 1969 and David Lusk Taylor dated September 30, 1969, contained in Exhibit P-11.

14. See Exhibit P-7 (Deposition of Charles Snodgrass, p. 19). A copy of the Otis Test is in evidence as Exhibit P-20.

15. See Exhibit P-7, pp. 21-22.

to train accepted applicants to become patrolmen in conformance with Section 8086 of the Mississippi Code. Three of these schools were conducted in 1968, one in 1969 and one in 1970, namely, from September 20, 1970 until completion on December 11, 1970.[16] Twenty-two persons, all White, were enrolled in this last conducted school. On April 28, 1971, the Mississippi Highway Patrol through the defendant, Crisler, applied for $18,000 in Federal LEAA Funds to conduct another recruit class for 25 men, which request was granted on May 18, 1971.[17] This recruit class has not been scheduled or begun.

21.

Neither the Department of Public Safety nor the Highway Safety Patrol does any public advertising or makes any public announcements when job vacancies become available.[18] Most of the patrolmen presently employed by the Patrol learned of vacancies and the fact that applications were being accepted through word-of-mouth inquiry from patrolmen who are their friends or relatives,[19] and the majority of the clerical positions in the Department are filled by walk-ins, many of whom are recommended by present employees.[20]

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16. See Exhibit P-13 (Answer 46 of Defendants' Answers to Plaintiffs' First Interrogatories).

17. See Exhibit P-15 (Answer 11 of Defendants' Answers to Plaintiffs' Second Interrogatories); see also Exhibit P-23, copy of the application and award.

18. Exhibit P-8 (Pre-Trial Order), Para. 7(9)(a); Exhibit P-13 (Answers 23, 24).

19. Exhibit P-8, Para. 7(9)(a); Exhibit P-15 (Answer 8).

20. See Exhibit P-7, pp. 33, 61.

The employment application forms utilized by the Department and the Patrol require an applicant to list his relatives employed by the State of Mississippi and his friends or acquaintances employed by the Patrol.[21] Of the 107 Whites hired as patrolmen since January 1, 1968, all but twelve listed friends or acquaintances employed by the Patrol, and forty-two listed relatives employed by the State of Mississippi.[22] Although there are communication media in the State of Mississippi, including television, radio and newspapers which reach a large portion of the Black community, neither the Department nor the Patrol has advertised the availability of jobs in any of these media or in any other news media in the State of Mississippi.[23] The officers of the Public Relations Bureau of the Department present recruitment programs, including speeches, to civic clubs, church groups and student groups throughout the state. Included in those programs are presentations on "the law enforcement profession" which includes a description of the employment opportunities and qualifications for positions with the Department and the Patrol. The audiences for such programs have been predominantly White.[24] A color motion picture film, apparently produced prior to January 1, 1968, which shows the physical plant and training operations of the Training Academy, has been available at the Patrol's public relations bureau and has been shown to groups of students as part of "career day" programs in schools in the State. In this film, which at the time of the time of trial of this case had been ordered

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21. See Exhibit P-13 (Answer 4 and Exhibits 5 and 6 thereto).

22. See Exhibit P-11.

23. See Exhibit P-7(9)(c).

24. See Exhibit P-15 (Answer 9).

by Commissioner Crisler not to be shown again,[25] all of the recruits, officers, instructors, Academy personnel and other persons are White with the exception of Black cooks and food servers in the cafeteria.[26]

23.

Until shortly before the trial of this case, the Department had no written rules or regulations prohibiting the use of racial terms or epithets by patrolmen, and the term "nigger" had at times been used by patrolmen in addressing Blacks.[27] The use of such racial epithets by patrolmen has now been prohibited by written regulation of the Patrol.[28]

24.

The Mississippi Department of Public Safety and the Mississippi Highway Safety Patrol have had a reputation throughout the State of Mississippi, and particularly among the Black communities, as being an all-White Department and Patrol, which has discouraged Blacks, with the exception of the two named plaintiffs, Coker, and probably only a few others, from applying for membership, particularly as sworn officers of the Patrol, by virtue of the fact that there have never been any Black sworn officers on the Patrol. This in part has resulted from the fact that the application forms provide for a listing of relatives employed by the State of Mississippi and friends and acquaintances on the Patrol and within the Department of

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25. See Exhibit P-5.

26. See Exhibit P-9 (Stipulation).

27. See Exhibit P-25 (Deposition of Snodgrass, pp. 98-100).

28. See Exhibit "C" to Defendants' "Chronicle of Post-Trial Events" dated July 12, 1971 and filed herein subsequent to the trial of this case which consists of pages 11(a) and (b) which have been added to the Departmental Rules and Regulations of each member of the Patrol, and particularly Para. 3 on page 11(a).

Public Safety, the former being all-White and the latter being almost all-White. Favoritism and partiality has been shown to those applicants having relatives, friends and acquaintances on the all-White Patrol.

25.

Although there was an unwritten policy in effect at all times during the tenure of office of the defendants which prohibited discrimination of any kind in connection with the hiring or promotion within the Department of Public Safety because of race, color, creed or national origin, the Departmental policy statement relating to applications for employment issued on June 21, 1971 and admitted in evidence as Exhibit D-1 during the trial of this cause was the first reduction of this policy into writing. This policy statement was rewritten so as to broaden it to include post-application treatment, training, assignment, transfers, promotions and other terms and conditions of employment. Also, the length of time for the receipt of applications after publication was extended to 30 days.[29] This written policy statement which is entitled "Applications for Employment" requires that an application form be given to any individual requesting it for employment in the Department of Public Safety, and provides that when the completed application is returned to the Personnel Department or any other appropriate department that a file shall be established on the applicant which will contain all information relative to his or her employment; that the distribution and processing of all applications shall be conducted without regard to race, creed, color or national origin, and that no individual shall be subjected to any racially discriminatory employment practice with the pur-

29. See "Chronicle of Post-Trial Events" filed by Defendants herein and particularly Exhibit "A" thereto.

pose of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of the applicant and employees of the Department to enjoy equal employment opportunity in hiring, training, assignment, transfer, promotion and retention of employment. Furthermore, this memorandum of policy provides that approximately two months prior to commencing a recruit training class, notice of the date of commencement shall be placed in a newspaper having general statewide circulation and this notice shall inform the public of the basic qualifications for the positions to be filled and that applications for those positions are being received by the particular office; that all applications received within 30 days of the first publication shall be processed in the same manner as directed therein, and that all applicants found to be qualified will be considered with all applicants who have previously qualified; and that applications received after 30 days will be held and processed for the next scheduled class. According to the "Chronicle of Post-Trial Events" this policy statement or memorandum was read and discussed with 81 officers undergoing in-service training at the Mississippi Law Enforcement Officers' Training Academy and it will continue to be discussed with each in-service class until each officer has been familiarized with it; furthermore, it has been placed on the agenda for the next scheduled staff meeting to be discussed in detail with the staff officers.

26.

According to the "Chronicle of Post-Trial Events", on July 1, 1971, the above 81 officers currently enrolled in the in-service training program at the Academy were read Section I-A, the Addendum to the Departmental Rules and Regulations which includes the prohibited use of derogatory terms in addressing anyone. They were also admon-

ished to exercise the utmost discretion in addressing all persons with whom they had contact and to particularly avoid the use of any derogatory terms relating to a person's race. These rules were forwarded to the printer and conformed to existing rules and regulations introduced during the trial of this cause as Exhibit D-3.

27.

On July 7, 1971, the printing department returned the rules and regulations, Exhibit D-4, and these were placed in the mail to the inspectors of the various districts with sufficient copies to update the Departmental Rules and Regulations possessed by each member of the Patrol.[30]

28.

On July 8, 1971, the policy statement regarding employment and the newly promulgated Rules and Regulations, Exhibits A and C to the "Chronicle of Post-Trial Events", were discussed with an additional twenty officers at the Mississippi Law Enforcement Officers' Training Academy currently enrolled in an investigative class.

29.

Since the trial of this cause on June 28 and 29, 1971 and through July 8, 1971, the defendant Snodgrass has received and begun processing applications from 29 White applicants and five Black applicants for positions on the Patrol.

30.

The Court further finds that the defendants, acting in their official capacities for and on behalf of the Depart-

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30. A copy of the additional pages and the letter of transmittal is attached to the "Chronicle of Post-Trial Events" as Exhibit "C".

ment of Public Safety and the Mississippi Highway Safety Patrol, have now begun to take many steps toward and have made substantial progress in promulgating policies and programs designed to insure equal treatment to citizens of all colors, races, creeds, and national origins in all aspects of hiring, promotions, treatment and activities within their departments.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction over the parties and the subject matter of this action.

2.

This action is properly maintained as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class or classes includes all qualified Negroes who have applied or will apply in the future for employment with the Mississippi Department of Public Safety and/or the Mississippi Highway Safety Patrol, all present Negro employees of the Department and the Patrol, and all future employees of the Department and the Patrol.

3.

Although the named plaintiffs, Morrow and Mangum, were objectively qualified to receive an application form and to apply for positions as sworn officers of the Mississippi Highway Safety Patrol in June, 1970 when they requested these forms, they were denied the requested forms solely because of the employment freeze or embargo in force and effect during that period because of budgetary reasons as were all other desirous applicants, both Black and White. They were not denied these forms because of their race, color, creed or for any other reason or purpose.

The plaintiffs failed to show that Peden or anyone else was given an application form during this period of time, and although Peden's application was received by the defendant, Snodgrass, contrary to the orders of Commissioner Crisler and the policy established for the Patrol during that period of time, it was accepted by Snodgrass solely because of his desire to favor Peden's patrolman brother-in-law who made this request; furthermore, this completed application was not processed at any time before those of other applicants for the September, 1970 training school. It is conclusively shown that at least two of those accepted in the training school, completed it successfully, and were hired as patrolmen, applied on September 17, 1970 and that the named plaintiffs Morrow and Mangum neglected or refused to return to procure application forms in September, 1970 as suggested or requested by Snodgrass and pursuant to the advice of their attorney. They are therefore not entitled to any of the specific relief requested by them except for their right to receive application forms and to apply for the positions of patrolmen which they have now done, and that their applications are now being processed in accordance with the newly stated policy of the Department and Patrol without regard to race, color, creed or national origin.

4.

Where the statistical disparities are great, it is unnecessary in establishing a prima facie case of racial discrimination that there be shown a conscious or intentional failure by the defendant officials to carry out the duties of their office or that the officials consciously and intentionally discriminated or acted from ill will or evil motives or that they lacked good faith. *Turner* v. *Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970); *Salary* v. *Wilson*, 415 F.2d 467 (C.A. 5, 1969), *cert. den.* 397 U.S. 907, 928

(1970). The absence of any substantial number of Black employees in state or state-connected institutions raises a presumption of discrimination against Blacks who have sufficient qualifications but have been denied employment. The statistics in this case show that no Blacks have ever been hired as patrolmen and that the Department of Public Safety, of which the Highway Safety Patrol is a part, has never employed any Blacks in any responsible position, but the only Blacks employed were and are cooks and janitors in two of the 27 bureaus of the Department. All of the supervisory personnel and employees of all except two bureaus of the Department are White. These facts or statistics are sufficient to establish a prima facie case of racial discrimination in hiring personnel for the Department and the Patrol. *Bing* v. *Roadway Express Corp.*, ... F.2d ..... (C.A. 5, No. 30414, June 29, 1971); *Jones* v. *Lee Way Motor Freight Inc.*, 431 F.2d 245 (C.A. 1970), *cert. den.*, 401 U.S. 954; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8, 1970); *Carter* v. *Gallagher*, ... F.Supp. ..... (D. Minn., No. 4-70, Civ., 399, March 9, 1971); *Alabama* v. *United States*, 304 F.2d 583, 586 (C.A. 5) *affd.*, 371 U.S. 37 (1962); *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

5.

The above statistics establish a prima facie case of racial discrimination in hiring and employment, and thus shifted to the defendants herein the burden of showing that the racial composition of the Department and the Patrol was the result of factors other than racial discrimination. *Turner* v. *Fouche, supra.* The burden cannot be and was not lifted merely by denials of discrimination or by categorical assertions of an illusionary unwritten prior rule prohibiting racial discrimination in hiring and em-

ployment. *Jones* v. *Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967); *Whitus* v. *Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Avery* v. *Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Norris* v. *Alabama*, 294 U.S. 587, 598, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). See also *Jones* v. *Lee Way Motor Freight, supra.* The defendants have failed to meet their burden of rebutting this prima facie case, and therefore the presumption of racially discriminatory policy established by the statistics must stand, despite this Court's finding of an absence here of proof by a preponderance of the evidence of a conscious or intentional discrimination on the part of the defendants or that they acted from ill will or evil motives or lacked good faith.

6.

The above stated racially discriminatory policies and practices of the defendants, as revealed by the statistical evidence, constitute a pattern and practice of racial discrimination in hiring and employment practices, albeit unintentional, in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. *United States* v. *Frazer*, 297 F.Supp. 319 (1968). These statistics, which are admitted and undisputed, entitle the plaintiffs and the plaintiff class to injunctive relief. Thus, the defendants and their successors in office are hereby enjoined from discriminating against plaintiffs or the class that they represent in the distribution receipt and processing of all applications within the Department of Public Safety and within the Mississippi Highway Safety Patrol as sworn officers, clerical help, secretaries and all other employment positions, and no other individual shall be subjected to any racially discriminatory employment

practice with the purpose of denying, abridging, withholding, conditioning, or otherwise interfering with the rights of applicants and employees of the Department to enjoy equal employment opportunity in hiring, training, assignment, and transfers, promotion and retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed or national origin. To this extent, the June 30, 1971 memorandum from the defendant, Commissioner Giles W. Crisler to Charles E. Snodgrass and department heads of the Department of Public Safety in this regard, attached to the "Chronicle of Post-Trial Events" as Exhibit "A" shall be and shall remain in effect and be complied with in the future and to that extent so much of said memorandum shall be implemented pursuant to the Decree of this Court.

7.

The defendants, their agents, servants, employees, attorneys, and successors in office shall also be restrained and enjoined from continuing, maintaining or instituting any of the following racially discriminatory practices:

(a) failing and refusing to permit the applicants to apply for positions with the Department of Public Safety solely because of race or color, creed or national origin;

(b) requiring applicants for patrolmen positions as a condition to consideration for employment, to pass a standardized general intelligence test or the Otis Quck Mental Scoring Test or any other tests which have not been validated nor proved to be significantly related to successful job performance. To this end, all applicants for positions in the Department of Public Safety and the Highway Safety Patrol shall in the future be required to comply with the regulations adopted by the Classification Commission of the State of Mississippi established by the legis-

lative Act found in Section 8935-01-14, Mississippi Code of 1942, as Recompiled and Amended, which covers all agencies including the Highway Patrol. All of the defendants and their successors in office in the Department and Patrol are hereby required to comply with the regulations adopted by the Classification Commission, including the giving of examinations which are standard nationally approved tests that are administered in an objective manner;

(c) applying to applicants for patrolmen positions, as a condition of hiring, vague and undefined subjective standards which may be used as a means of discriminating on the basis of race, color, creed or national origin without objective verification;

(d) failing and refusing to hire and train applicants for staff positions with the Department of Public Safety solely because of their race, color, creed or national origin;

(e) maintaining any departments, divisions and/or bureaus within the Department of Public Safety for Whites only;

(f) maintaining certain jobs and job categories within the Department of Public Safety for Whites only and others for Negroes only;

(g) failing and refusing to promote employees to positions of higher responsibility and benefits or to supervisory positions solely because of their race, color, creed or national origin;

(h) maintaining any physical facilities on a segregated basis of race or color; and

(i) otherwise applying terms and conditions of employment within the Department of Public Safety in a racially discriminatory manner.

8.

Plaintiffs and the class that they represent are entitled to a five year freeze of standards and qualifications for applicants so that it will not be more difficult for future employees, Blacks and Whites, to be hired than it was for those employees hired since June 1, 1968.

9.

It is obvious to this Court and it concludes as a matter of law that favoritism or at least preference in hiring has been shown to the relatives, friends and acquaintances of employees of the State of Mississippi and more particularly the Department of Public Safety and of the Mississippi Highway Safety Patrol. Therefore, application forms to be utilized in the future shall not ask these questions nor contain any information in this regard, and no preference shall be shown to any applicant nor shall any be favored in any respect because he has a relative, friend, or acquaintance employed by the Department of Public Safety, Highway Safety Patrol, or other department or agency of the State of Mississippi.

10.

The defendants shall be enjoined from showing or in any way utilizing any motion picture film including that one already barred by the Commissioner, or other similar visual aid to promote recruitment which emphasizes or implies that responsible positions or any other positions within the Department or Patrol are open to or held by Whites only. This prohibition and all prohibitions herein shall apply to the defendants and their successors in office and the Decree to be presented in conformance herewith shall so specifically state.

11.

The defendants and their successors in office shall give all notices of and conduct all mental tests or examinations in conformance with the rules and regulations of the Mississippi Classification Commission. If those rules or regulations do not provide otherwise, the defendants shall for a period of at least three months prior to the convening of each Patrol Recruit Training Class and at least thirty days prior to the filling of vacancies in other positions in the Department, advertise in newspapers and on radio and television throughout the State, including those particularly oriented to and providing maximum coverage to the Black population, that applications are being received for patrolmen positions, or that vacancies exist for other positions in the Department, prominently indicating in each instance that applications will be received and considered without regard to race, color, creed or national origin; and shall also specify the exact mechanics and procedures to be followed in applying. All applications received within 45 days of the first publication of the above referenced announcement shall be processed in the same manner as directed above and all applicants found to be qualified will be considered with all applicants who have previously qualified. Those applications received after the 45 days will be held and processed for the next scheduled class. However, positions on the Patrol and in other bureaus of the Department may be filled without advertising on a temporary basis to fill emergency needs. Copies of all such advertising, names of news media employed, and the dates of such advertising shall be kept in a permanent file by the Departmental custodian of records, open to public inspection at all reasonable times.

12.

Any visits for purposes of recruitment by any employees of the Department of Public Safety and/or the Mississippi Highway Safety Patrol or by anyone else for the purpose of securing employees for the Department or Patrol to colleges, churches, civic clubs, etc. shall be done in such a manner as to achieve maximum coverage to potential applicants or employees on a nondiscriminatory basis, such recruitment efforts to be made at as many predominantly Black colleges, junior colleges and high schools within the state as nearly as feasible and practicable.

13.

The defendants and their agents, servants, employees, attorneys and successors in office are hereby ordered to comply with Addendum I-A to the Departmental Rules and Regulations, Public Relations, attached as Exhibit "C" to the "Chronicle of Post-Trial Events" filed herein by the plaintiffs with reference to restrictions and prohibitions of the use of any racial terms and epithets which are humiliating, derogatory and insulting to anyone because of their race, color, creed or national origin.

14.

The defendants and their successors in office are hereby restrained and enjoined to make the following reports and maintain the following records:

(a) Records showing the name, address, race and date of application and disposition of the application of each person applying for or seeking an application for any position with the Department or Patrol, and retain each such application forms for a period of three years, and such records shall be public records in the office of the defen-

dants subject to review, inspection and copying during regular business hours, in a manner which does not unduly interfere with the conduct of normal business.

(b) The defendants shall also maintain a public record during the next five years listing the name, race, position and pay rate of all employees of the Department of Public Safety and the Highway Safety Patrol, and especially showing which employees have been newly hired, promoted, demoted and discharged during this reporting period.

15.

The proposed Decree of this Court shall be presented by the parties as hereinafter directed and when signed and filed herein shall be posted by the defendants on regular informational bulletin boards in all Patrol and Department installations throughout this State, including their Jackson Headquarters for a period of 30 days, and the defendants and their successors in office shall instruct each division and bureau chief of the Department of Public Safety to instruct all employees under their supervision to familiarize themselves with the terms of this Court's Decree.

16.

All taxable court costs herein shall be taxed against the defendants, and because of the foregoing Findings and Conclusions this Court is of the opinion that plaintiffs are entitled to the payment of attorney's fees by the defendants in the amount of $500.00.

17.

In view of this Court's Findings of Fact and Conclusions of Law, all objections on which this Court reserved ruling during the trial of this cause shall be overruled.

18.

This Court shall retain jurisdiction of this action to enforce compliance with its Decree to be entered herein and for any further action as may be necessary.

19.

A Decree conforming with the above and foregoing Findings of Fact and Conclusions of Law shall be presented to this Court, approved as to form by counsel for plaintiffs and defendants, within the time and in the manner prescribed by the Rules of this Court.

/s/ Walter L. Nixon, Jr.
United States District Judge

Biloxi, Mississippi
September 29th, 1971

APPENDIX "D"

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION

No. 4716

WILLIE L. MORROW and JEROME MANGUM, individually and on behalf of all others similarly situated,

Plaintiffs,

-vs-

GILES W. CRISLER, Commissioner of Public Safety of Mississippi, JAMES D. GARDNER, Chief of the Mississippi Highway Safety Patrol; JOHN BELL WILLIAMS, Governor of Mississippi; and CHARLIE SNODGRASS, Personnel Officer of the Mississippi Department of Public Safety,

Defendants.

JUDGMENT AND ORDER FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed October 18, 1971)

This action having come on for final hearing before Honorable Walter L. Nixon, Jr., United States District Judge, on June 28 and 29, 1971, and the issues having been duly heard, and a decision having been duly rendered on September 29, 1971.

It is, therefore, in accordance with the Court's decision of September 29, 1971, ORDERED, ADJUDGED AND DECREED:

A. *Declaratory Relief.* The Court declares that the plaintiffs and the members of the plaintiff class, defined as all qualified Negroes who have applied or will apply in the future for employment with the Mississippi Department of Public Safety and/or the Mississippi Highway Safety Patrol, all present Negro employees of the Department and the Patrol, and all future employees of the Department and the Patrol, have a right secured by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §§ 1981 and 1983 to be free from racially discriminatory employment practices of the defendants and have a right secured by the Constitution and laws of the United States to be free of any policy, practice, custom, or usage of the defendants or their successors in office of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs and the plaintiff-class to enjoy equal employment opportunity in hiring, training, assignment, transfers, promotion, retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed or national origin.

B. *Injunctive Relief.* The defendants herein, Governor John Bell Williams, Governor of Mississippi, Giles W. Crisler, Commissioner of Public Safety, J. D. Gardner, Chief of Patrol of the Mississippi Highway Safety Patrol, and Charles E. Snodgrass, Personnel Director of the Department of Public Safety, their officers, agents, servants, employees, attorneys, and successors in office and those persons in active concert and participation with them, are hereby enjoined and restrained as follows:

1. From discriminating against plaintiffs or the class that they represent in the distribution, receipt and processing of all applications within the Department of Public Safety and within the Mississippi Highway Safety Patrol

as sworn officers, clerical help, secretaries and all other employment positions, and no other individual shall be subjected to any racially discriminatory employment practice with the purpose of denying, abridging, withholding, conditioning, or otherwise interfering with the rights of applicants and employees of the Department to enjoy equal employment opportunity in hiring, training, assignment, and transfers, promotion and retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed or national origin. To this extent, the June 30, 1971 memorandum from the defendant, Commissioner Giles W. Crisler to Charles E. Snodgrass and department heads of the Department of Public Safety in this regard, attached to the "Chronicle of Post-Trial Events" as Exhibit "A", and attached herein as Exhibit 1, shall be and shall remain in effect and be complied with in the future and to that extent so much of said memorandum shall be implemented pursuant to the Decree of this Court.

2. From continuing, maintaining or instituting any of the following racially discriminatory practices:

(a) failing and refusing to permit the applicants to apply for positions with the Department of Public Safety solely because of race or color, creed or national origin;

(b) requiring applicants for patrolmen positions as a condition to consideration for employment, to pass a standardized general intelligence test or the Otis Quick Mental Scoring Test or any other tests which have not been validated nor proved to be significantly related to successful job performance. To this end, all applicants for positions in the Department of Public Safety and the Highway Safety Patrol shall in the future be required to comply with the regulations adopted by the Classification Com-

mission of the State of Mississippi established by the legislative Act found in Section 8935-14, Mississippi Code of 1942, as Recompiled and Amended, which covers all agencies including the Highway Patrol. All of the defendants and their successors in office in the Department and Patrol are hereby required to comply with the regulations adopted by the Classification Commission, including the giving of examinations which are standard nationally approved tests that are administered in an objective manner;

(c) applying to applicants for patrolmen positions, as a condition of hiring, vague and undefined subjective standards which may be used as a means of discriminating on the basis of race, color, creed or national origin without objective verification;

(d) failing and refusing to hire and train applicants for staff positions with the Department of Public Safety solely because of their race, color, creed or national origin;

(e) maintaining any departments, divisions and/or bureaus within the Department of Public Safety for Whites only;

(f) maintaining certain jobs and job categories within the Department of Public Safety for Whites only and others for Negroes only;

(g) failing and refusing to promote employees to positions of higher responsibility and benefits or to supervisory positions solely because of their race, color, creed or national origin;

(h) maintaining any physical facilities segregated on the basis of race or color; and

(i) otherwise applying terms and conditions of employment within the Department of Public Safety in a racially discriminatory manner.

3. From applying as a condition of employment, for the next five years from the date of this Decree, any new standards or qualifications for applicants more stringent than those applied, as a matter of practice, to employees hired since June 1, 1968, so that it will not be more difficult for future employees, blacks and whites, to be hired than it was for those employees hired since June 1, 1968.

4. From using application forms which ask questions or contain any information regarding the relatives, friends, and/or acquaintances of employees of the State of Mississippi, or the Department of Public Safety or the Mississippi Highway Patrol, and from providing or exhibiting any preference or favoritism toward any applicant for any position with the Department or Patrol because he has a relative, friend, or acquaintance employed by the State of Mississippi, or by the Department of Public Safety or the Highway Safety Patrol.

5. From showing or in any way utilizing any motion picture film including the film "Law Enforcement Officers' Training Academy" already barred by the Commissioner, or other similar visual aid to promote recruitment which emphasizes or implies that responsible positions or any other positions within the Department or Patrol are open to or held by whites only.

6. The defendants and their successors in office shall give all notices of and conduct all mental tests or examinations in conformance with the rules and regulations of the Mississippi Classification Commission. If those rules or regulations do not provide otherwise, the defendants shall for a period of at least three months prior to the convening of each Patrol Recruit Training Class and at least thirty days prior to the filling of vacancies in other positions in the Department, advertise in newspapers and on radio and television throughout the State, including

those particularly oriented to and providing maximum coverage to the black population, that applications are being received for patrolmen positions, or that vacancies exist for other positions in the Department, prominently indicating in each instance that applications will be received and considered without regard to race, color, creed or national origin; and shall also specify the exact mechanics and procedures to be followed in applying. All applications received within 45 days of the first publication of the above referenced announcement shall be processed in the same manner as directed above and all applicants found to be qualified will be considered with all applicants who have previously qualified. Those applications received after the 45 days will be held and processed for the next scheduled class. However, positions on the Patrol and in other bureaus of the Department may be filled without advertising on a temporary basis to fill emergency needs. Copies of all such advertising, names of news media employed, and the dates of such advertising shall be kept in a permanent file by the Departmental custodian of records, open to public inspection at all reasonable times.

7. Any visits for purposes of recruitment by any employees of the Department of Public Safety and/or the Mississippi Highway Safety Patrol or by anyone else for the purpose of securing employees for the Department or Patrol to colleges, churches, civic clubs, etc. shall be done in such a manner as to achieve maximum coverage to potential applicants or employees on a nondiscriminatory basis, such recruitment efforts to be made at as many predominantly black colleges, junior colleges and high schools within the state as nearly as feasible and practicable.

8. To comply with Addendum I-A to the Departmental Rules and Regulations, Public Relations, attached

as Exhibit "C" to the "Chronicle of Post-Trial Events" filed by the plaintiffs, and attached herein as Exhibit 2, with reference to restrictions and prohibitions of the use of any racial terms and epithets which are humiliating, derogatory and insulting to anyone because of their race, color, creed or national origin.

9. To make the following reports and maintain the following records:

(a) Records showing the name, address, race and date of application and disposition of the application of each person applying for or seeking an application for any position with the Department or Patrol and retain each such application form for a period of three years from the date of this Decree, and such records shall be public records in the office of the defendants subject to review, inspection and copying during regular business hours, in a manner which does not unduly interfere with the conduct of normal business.

(b) The defendants and their successors in office shall also maintain a public record during the next five years from the date of this Decree listing the name, race, position and pay rate of all employees of the Department of Public Safety and the Highway Safety Patrol, and especially showing which employees have been newly hired, promoted, demoted and discharged during this reporting period.

C. Plaintiffs' request for specific relief, including an injunction requiring the defendants to hire and train them for positions for which they sought application forms in June, 1970, and back pay and other benefits lost as a result of defendants' refusal to provide them with application forms in June, 1970, is hereby denied, except that the plaintiffs are entitled to the protection of the injunctive relief as stated above.

D. Plaintiffs' request for such affirmative relief as would require the defendants to increase the number of black officers on the Mississippi Highway Patrol, by minority preference or a racial quota system, to the end that the percentage of blacks on the Patrol does not significantly differ from the percentage of blacks in the population of the State of Mississippi, is hereby denied.

F. All taxable court costs herein are taxed against the defendants, and defendants are hereby ordered to pay to plaintiffs attorney's fees in the amount of $500.00.

G. This Court shall retain jurisdiction of this action to enforce compliance with its Decree entered herein and for any further action as may be necessary.

H. The defendants are hereby ordered to post or cause to be posted this Judgment and Order for Declaratory and Injunctive Relief on regular informational bulletin boards in all Patrol and Department installations throughout this State, including their Jackson Headquarters, for a period of 30 days immediately after entry of this Decree, and the defendants and their successors in office are hereby ordered to instruct each division and bureau chief of the Department of Public Safety to instruct all employees under their supervision to familiarize themselves with the terms of this Court's Decree.

I. The Clerk is directed to mail by certified mail, return receipt requested, a certified copy of this Judgment and Order for Declaratory and Injunctive Relief to each of the parties, by their attorneys, and such mailing shall constitute notice to the plaintiffs and the defendants and their successors in office of the terms of the Judgment and Order.

ORDERED, ADJUDGED, AND DECREED on this 14th day of October, 1971.

/s/ Walter L. Nixon, Jr.
United States District Judge

Approved as to form:

/s/ Frank R. Parker
Attorney for Plaintiffs

/s/ P. Roger Googe, Jr.
Attorney for Defendants

Exhibit 1

STATE OF MISSISSIPPI
DEPARTMENT OF PUBLIC SAFETY

Giles W. Crisler
Commissioner of Public Safety

J. D. Gardner
Assistant Commissioner
Chief of Patrol

Phone 982-1212 Area Code 601
P. O. Box 958
JACKSON, MISSISSIPPI 39205

June 30, 1971

MEMORANDUM

TO: Charles E. Snodgrass and Department Heads

FROM: Commissioner Giles W. Crisler

SUBJECT: *Applications for Employment*

This policy statement will substitute for that statement previously given to you on June 21, 1971, and will be adhered to in carrying out your duties.

Any individual requesting an application form for employment in the Department of Public Safety shall, upon request, be given an application form and any necessary

information in regard thereto. When the completed application is returned to your office, a file shall be established on the applicant which will contain all information relative to his or her employment.

The distribution and processing of all applications shall be conducted without regard to race, creed, color, national origin, or religion, and no individual shall be subjected to any racially discriminatory employment practice with the purpose of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of applicants and employees of the Department of Public Safety to enjoy equal employment opportunity in hiring, training, assignment, transfers, promotions, and retention in employment and other terms and conditions of employment without discrimination on the basis of race, color, creed, national origin, or religion.

Approximately two months prior to commencement of a recruit training class, notice of the date of commencement shall be placed in a newspaper having general statewide circulation. This notice shall inform the public of the basic qualifications for the position to be filled and that applications for these positions are being received by your office.

All applications received by your office within thirty days of the first publication of the above-referenced announcement shall be processed in the same manner as directed above. All applicants found to be qualified will be considered with all applicants who have previously qualified. Those applications received after thirty days will be held and processed for the next scheduled class.

/s/ Giles W. Crisler
Giles W. Crisler
Commissioner of Public Safety

GWC:jd

Exhibit 2

Section I-A. Public Relations

1. Public relations, insofar as it relates to the Highway Patrol, is the sum total of the attitudes, impressions, and opinions of the public in its relationship with the Department.

   The mutual advantages of a friendly relationship between the people of a community and their patrol force should be widely understood and more fully appreciated. The success of a highway patrol force in the performance of its duties is largely measured by the degree of support and cooperation it receives from the people it serves. It is of paramount importance, therefore, to secure for this Department the confidence, respect, and approbation of the public. The cultivation of such desirable attitudes on the part of the public is dependent upon reciprocal attitudes on the part of this Department. These policies designed to enhance good public relations anticipate active participation therein by every member of the Department.

   There is a personal satisfaction derived from the proper performance of patrol duty. Public service is one of the noblest professions, and it is never nobler than when rendered to the weak and the uncertain, the cast-off and the helpless.

2. The principal factors involved in determining a relationship between this Department and the public are:

   —Highway Patrol Service—the attitude of the Highway Patrol toward the people of the community and their department and efficiency in the performance of their duties.

—The Public—the attitude of the people toward the patrol and law enforcement in general.

—Ethnic Composition of the Community.

—News Media and Public Information.

3. It is not sufficient that officers do a professional job of law enforcement. It is of equal importance that everyone be convinced that such is the case. Verbal abuse is no less reprehensible than physical abuse. Profanity and/or derogatory terms relating to a person's race, creed, color, and/or national origin have no place in a Highway Patrol officer's vocabulary.

   You must act, speak and conduct yourself in such a manner as to treat all persons with complete courtesy and with respect.

4. Policy:—The personal conduct of each member of the Department is the primary factor in promoting a program of desirable public relations. Tact, patience, and courtesy shall be strictly observed under all circumstances.

   —A Patrol officer is a public official representing all the people. He shall maintain a professional attitude and demeanor which will not in any manner communicate any personal prejudices.

   —Superior officers shall by example demonstrate and shall instruct subordinates in proper deportment and desirable attitudes, in their dealings with the public.

   —Members of the Department shall avoid behavior such as would tend to bring about criticism of the Department. Their conduct, whether on or off duty, shall be such as to merit the respect and confidence of the people.

—Officers shall diligently perform their duty with professional dignity. They shall not convey an attitude of subservience or servility.

—Each officer shall perform his duty fearlessly and impartially, keeping uppermost in his mind that he is the guardian of the people's constitutional guarantees and civil rights, as well as the protector of their lives and property.

—Commanding officers shall acquaint themselves with the organized groups and individuals within their respective commands interested in promoting religious, racial, national, or civic programs. They shall learn the identity of key persons, the objectives or primary purposes of such organizations, and shall keep informed of their current interests.

—Petitions, committees of protests, appeals for assistance, and letters or other forms of complaint, shall be given prompt, personal attention and careful study by commanding officers. Every effort shall be made to correct improper conditions or if proper to render the assistance requested.

APPENDIX "E"

[¶ 7584] Willie L. Morrow et al., Plaintiffs v. Giles Crisler, Commissioner of Public Safety of Mississippi et al., Defendants.

United States District Court, Southern District of Mississippi, Jackson Division. Civil No. 4716. November 30, 1971.

Civil Rights Acts of 1866 and 1871

Racial Discrimination—State Employees—Court Action—Attorney's Fees.—Considerations of the time spent by counsel and of the average rate per hour earned in civil cases warrant a reassessment of, and increase in, the amount of a prior award of attorney's fees to complaining job applicants in their suit for declaratory and injunctive relief regarding the hiring practices of a state highway safety patrol. 42 U. S. C. Secs. 1981, 1983.

Reassessing award of attorney's fees in (DC Miss. 1971) 4 EPD ¶ 7451, which issued pursuant to (DC Miss. 1971) 4 EPD ¶ 7563, following ruling in (DC Miss. 1971) 3 EPD ¶ 8119.

Frank R. Parker and Constance Iona Slaughter, Jackson, Mississippi, for Plaintiffs.

A. F. Summer, Attorney General of Mississippi, William A. Allain, P. Roger Googe, Jr., and C. A. Marx, Jackson, Mississippi, for Defendants.

David L. Norman, Acting Assistant Attorney General, Robert E. Hauberg, U. S. Attorney, David L. Rose, William B. Fenton, and Herman G. Thompson, Attorneys, U. S. Department of Justice, for United States of America, as *Amicus Curiae*.

NIXON, Jr., D. J.: This cause having come before the Court on Motion of the plaintiffs to Amend Judgment to Reassess Amount of Award of Attorney's Fees, and the Court having examined the authorities presented by each party, in addition to the affidavit of Frank Parker, attorney for the plaintiffs, itemizing his time spent in trial preparation and trial of this action, and the affidavits of other practicing attorneys concerning their average rate per hour in civil cases, and having considered the criteria established by the Mississippi Bar Association, "Fee Computation and Suggested Minimum Schedule" (1967); this Court finds and is of the opinion that the Motion of the plaintiff is well taken; and further considering, in addition to the above enumerated factors, the finding by the Court that the named plaintiffs failed to prove any conscious or intentional discrimination on the part of the defendants but that the defendants had not overcome the presumption of racially discriminatory employment practices by a showing that the all-white composition of the Mississippi Highway Safety Patrol was the result of other factors, and the finding by the Court that the two named plaintiffs representing the class in this action could have received application blanks upon request in August and September of 1970 subsequent to the employment freeze:

It is hereby ordered that reasonable attorney's fees in this case, payable to the plaintiffs' attorneys, should be assessed in the amount of $3,000.

Ordered, Adjudged and Decreed.

APPENDIX "F"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 4716(N)

WILLIE L. MORROW, ET AL
PLAINTIFFS

VS.

GILES W. CRISLER, COMMISSIONER OF PUBLIC SAFETY, ET AL
DEFENDANTS

MEMORANDUM AND ORDER

(Filed May 25, 1972)

This cause is before the Court on Motion of the defendants[1] to Modify the Judgment of October 18, 1971 granting an injunction in this case, and filed pursuant to Rule 62(c), F.R.C.P., and on Motion of the plaintiffs for Contempt and/or Injunction Pending Appeal.

The defendants seek an extension of the cut-off date for receiving and processing applications for the patrol recruit training class schedule to begin on June 4, 1972. The injunction of this Court required that all applications for the position of uniformed patrolmen received subsequent to 45 days of the first publication of notice of a patrol recruit training class be held over and processed for the next scheduled class. The defendants seek an extension of this 45 day cut-off date (March 29, 1972), up to and

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1. Pursuant to Rule 25(d), F.R.C.P., there has been an automatic substitution of the following defendants: William Waller, Governor of Mississippi; W.O. Dillard, Commissioner of Public Safety; Wood Stringer, Jr., Chief of Patrol.

including May 26, 1972, because they "have been unable to find sufficiently qualified black applicants to attend the said patrol recruit training class."

The plaintiffs in this action had originally sought a cut-off date 60 days after publication of notice of a class to be held, whereas the defendants requested a cut-off date 30 days after notice. Thus, the plaintiffs' attorney stated to the Court that "in a vacuum" the plaintiffs would have no objection to an extension of the time for receiving and processing applications inasmuch as this could result in additional blacks qualifying for participation in the June 4, 1972 training class; however, they contend that the requested extension was necessitated by the defendants' use of a racially discriminatory test which had not been properly validated nor proved to be significantly related to successful job performance, or in the alternative, that the test was administered in a racially discriminatory manner. The plaintiffs contend that the defendants are in violation of Paragraphs 2(B) and 3(B) of this Court's Judgment and seek by their affirmative motions to enjoin the use of the results of the April 22, 1972 test which they contend excludes otherwise qualified black applicants from attending the training class and to prohibit the future use of other racially discriminatory test not validated or significantly related to job performance.

The plaintiffs further request that the defendants be required to increase the number of black officers on the patrol by implementing a minority preference or a racial quota system, until the black percentage in the patrol reaches the percentage of blacks in the population of the State of Mississippi.

The case was appealed to the United States Court of Appeals for the Fifth Circuit on February 11, 1972 and the Court is informed by the parties that oral argument is

scheduled for the middle of June. The jurisdiction of a District Court to modify or issue an injunction during the pendency of an appeal from a Final Judgment granting an injunction is certainly extremely limited under Rule 62(c), F.R.C.P., and is reserved for those situations in which action is necessary in order to preserve the status quo pending appeal. *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir., 1969); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623 (2nd Cir., 1962); *United States* v. *El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir., 1951); *Angle* v. *Shinholt*, 90 F.2d 294 (5th Cir., 1937); Barron & Holtzoff, Federal Practice and Procedure, § 1373; Moore's Federal Practice, 2nd Ed., § 62.05. Although the case law interpreting Rule 62(c) relates primarily to the granting or staying of an injunction pending appeal, it is clear that the rule also envisions the modification of an injunction pending appeal. *Ferguson* v. *Tabah*, 288 F.2d 665 (2nd Cir., 1961).

The primary considerations in determining whether relief should be granted under Rule 62(c) are the substantial likelihood that the movant would prevail on the merits of the appeal, the possible irreparable injury to either party, and the substantial harm to other persons or the public interest. *Pitcher* v. *Laird*, 415 F.2d 743 (5th Cir., 1969).

Initially, it should be noted that this Court determined in its Opinion filed September 29, 1971 that the plaintiffs had failed to prove any conscious or intentional discrimination in employment practices on the part of the patrol officials and further that the two plaintiffs representing the class herein could have received application blanks upon request in August or September of 1970 subsequent to the employment freeze. The Court held, however, that the statistical disparities in this case created a presump-

tion of racially discriminatory employment practices and that the defendants had failed to overcome that presumption by showing that the all-white composition of the Mississippi Highway Safety Patrol was the result of other factors.

Included in the extensive relief granted the plaintiffs and their class pursuant to the Court's findings was the requirement that the defendants advertise the commencement of a patrol training class at least three months in advance and the setting of a cut-off date for processing applications 45 days after the initial notice. As heretofore noted, this time limitation set by the Court was a compromise between the suggested time limitations submitted by the parties. The extension of the deadline, as requested herein by the defendants, could only inure to the benefit of the plaintiffs' class by increasing the number of black applicants who might qualify for participation in the June 4, 1972 training class. There would certainly be no irreparable injury to either party or to other parties and the extension would, in this Court's opinion, be in the public interest. The underlying goal of the relief granted in this case was the removal of the statistical disparities which necessitated action by this Court. The effectiveness of any eventual Judgment, after all appeals have been exhausted, can only be enhanced by the granting of the extension sought by the defendants.

This Court is of the opinion that under the circumstances of this case, and the authorities cited hereinabove, this Court can and should exercise its jurisdiction to modify the Judgment granting an injunction on October 18, 1971 and permit the requested modification.

The relief now sought by the plaintiffs presents a much more difficult issue for determination. In the relief granted the plaintiffs in this case on October 18, 1971, this

Court enjoined the defendants from requiring patrol applicants to pass "a standardized general intelligence test or the Otis Quick Mental Scoring Test or any other tests which have not been validated nor proved to be significantly related to successful job performance." In order to prevent even the suspicion of any racially discriminatory testing of patrol applicants, this Court directed that the defendants comply with the regulations of the Classification Commission of the State of Mississippi, which this Court found applied to the Highway Patrol, "including the giving of examinations which are standard nationally approved tests that are administered in an objective manner."

Accordingly, the personnel officer of the Mississippi Department of Public Safety, Charles E. Snodgrass, submitted the names of approximately 300 applicants to the Mississippi Classification Commission for testing for patrol positions and the testing date was ultimately set by the Classification Commission for April 22, 1972. The defendant, Snodgrass, testified at the hearing held on this matter that he did not consult with the Classification Commission concerning the test to be given or the testing procedure to be utilized but only submitted the list of applicants and received from the Commission the names of those individuals who had passed or failed. He further testified that he furnished the Classification Commission a job description for a uniformed officer of the Mississippi Highway Safety Patrol and the Court is informed by defendants' counsel that the Classification Commission was given a copy of this Court's Opinion and Judgment.

It is undisputed that of the 227 applicants tested by the Classification Commission, 171 white and 56 black, 108 received passing grades, 105 whites and 3 blacks. (See Plaintiffs' Exhibit 1; Testimony of Charles E. Snod-

grass).[2] It is the contention of the plaintiffs that the results of this test alone is a sufficient basis for this Court to hold the defendants in civil contempt for violation of its October injunction and to issue an injunction pending appeal prohibiting the use of the results of this test in determining applicants for the positions in the June 4, 1972 recruit training class and the granting of the other affirmative relief sought by the plaintiffs. On the basis of these test scores, the plaintiffs also seek the implementation by this Court of a minority preference or racial quota system in the hiring of blacks for positions on the patrol.

Subsequent to the hearing held herein on May 19, 1972, the defendants filed the Affidavit of James D. Cox, Jr., Classification and Test Supervisor of the Mississippi Classification Commission which confirms the testimony of the defendant Snodgrass and reveals that the test utilized by the Classification Commission was the Army General Classification Test. Cox states that, in his opinion, the test had been validated and studies involving police trainees have shown correlation of .50 to .73 with grades and further that this is the same test given recruits for the North Carolina Highway Patrol.

Under the circumstances of this case, this Court is of the opinion that it cannot and should not exercise any jurisdiction pursuant to Rule 62(c), F.R.C.P., or under its general equity powers to completely reopen this case while on appeal to consider whether the test administered by the Mississippi Classification Commission was racially discriminatory or administered in a racially discriminatory

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2. The defendant Snodgrass also testified that the June 4, 1972 patrol recruit training class would be composed of approximately 22 to 25 persons. The patrol is now operating at approximately 353 men, whereas its normal strength should be around 375 men.

manner. We deliberately or purposely placed the testing of applicants for positions with the Highway Safety Patrol in the hands of an independent body specifically designated under state law to test applicants for state positions. The defendants, through Snodgrass, furnished the Classification Commission the names of the applicants to be tested, a job description of the position to be filled, and a copy of this Court's Opinion and Judgment requiring that the test administered be related to job performance. The rules and regulations of the Commission specifically provide that "examinations shall be practical in nature and shall relate to the duties of the position", and further provide for an appeal procedure which may be utilized by any aggrieved applicant. Additionally, the Affidavit of James D. Cox, Jr., reveals that as Classification and Test Supervisor for the Mississippi Classification Commission he selected the Army General Classification Test as the test to be administered patrol applicants, that the test is the one given to recruits for the North Carolina Highway Patrol, and further, that the test administered was validated with studies revealing correlations of .50 to .73 with grades for police trainees.

It is the opinion of this Court that the results of this one test of initial applicants administered pursuant to a comprehensive Court Order, devised extensively by the parties hereto with Court supervision and designed to eliminate the statistical disparities found by the Court, does not vest this Court with jurisdiction pending appeal to interfere at this time with the filling of uniformed positions with the patrol, which is essential to the continued protection of the lives and property of the citizens of this State.

The proof presented by the plaintiffs herein does not require a lengthy, de nova examination at this time of the

testing procedures utilized by the Mississippi Classification Commission in determining the eligibility of applicants for patrolmen positions. This Court has retained jurisdiction of this case to insure the compliance with and effectiveness of the terms of its October 18, 1971 injunction and would take action now if it felt such was required or necessary to insure the effectiveness of its Judgment or any eventual Judgment.

Finally, the requests for affirmative relief in the form of the implementation of a minority preference or a racial quota system in the hiring of patrolmen was specifically denied by this Court in its October 18, 1971 injunction and this Court remains of the opinion that this relief is not required nor desirable under the circumstances of this case.

It is therefore the Order of this Court that:

1. The following persons shall be substituted as defendants herein pursuant to Rule 25(d), F.R.C.P.: William Waller, Governor of Mississippi; W. O. Dillard, Commissioner of Public Safety; Wood Stringer, Jr., Chief of Patrol.

2. The defendants are hereby granted an extension of time for the receiving and processing of applications for the patrol recruit training class, scheduled to begin June 4, 1972, from March 29, 1972 up to and including May 26, 1972.

3. The plaintiffs' Motion for Contempt and/or for an Injunction Pending Appeal is hereby denied.

4. Each party shall bear its own costs and attorney's fees for the presentation of their respective motions.

ORDERED and ADJUDGED this 25th day of May, 1972.

/s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX "G"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1136

WILLIE L. MORROW AND JEROME MANGUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants-
Cross Appellees,

versus

GILES W. CRISLER, COMMISSIONER OF PUBLIC SAFETY OF MISSISSIPPI, ET AL,

Defendants-Appellees-
Cross Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

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(Filed November 8, 1973)

ORDER:

IT IS ORDERED that the motion of Appellants filed on May 7, 1973 to supplement the record on appeal be, and the same is hereby GRANTED.

/s/ John R. Brown
Chief Judge